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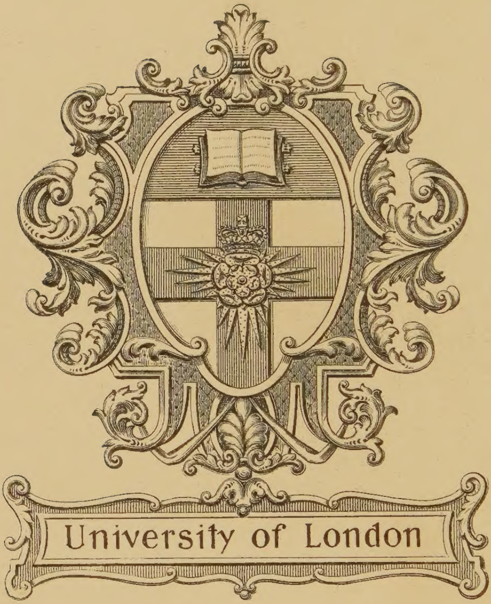

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32 & 33 *Vict.* c. 67 (*Valuation* (*Metropolis*)), s. 4. Bell Property Trust, Ld. *v.* Hampstead Assessment Committee - - - **C. A. 543**

—— —— s. 47. Rex *v.* Westminster (City) Assessment Committee. *Ex parte* Grosvenor House (Park Lane), Ld. - - **Div. Ct. 350**

1875.

38 & 39 Vict. c. 55 (*Public Health*), s. 153. *In re* Jesty's Avenue, Broadway, Weymouth - - **Div. Ct. 65**

1876.

39 & 40 Vict. c. 36 (*Customs Consolidation*), s. 186. Gorman *v.* Barnard and Another - - - **C. A. 570**

1880.

43 & 44 Vict. c. 42 (*Employers' Liability*), s. 1. Hills *v.* Co-operative Wholesale Society, Ld. **Macnaghten J. 74**

1882.

45 & 46 Vict. c. 61 (*Bills of Exchange*), s. 20. Griffiths *v.* Dalton **Macnaghten J. 264**

STATUTES—*continued.*

1891.

54 & 55 Vict. c. 39 (*Stamp*), s. 54. Jopling *v.* Inland Revenue Commissioners **Lawrence J. 282**

1893.

56 & 57 Vict. c. 71 (*Sale of Goods*), s. 25, sub-s. 1. Olds Discount Co., Ld. *v.* Krett and Another **Stable J. 117**

1894.

57 & 58 Vict. c. 30 (*Finance*), s. 1; s. 2, sub-s. 1 (*c*); s. 22, sub-s. 1 (*f*). Att.-Gen. *v.* Oldham - **C. A. 485**

1910.

10 Edw. 7, c. 8 (*Finance* 1909-10), s. 43; s. 50, sub-s. 3; Sch. I. Hotel Regina (Torquay), Ld. *v.* Moon **Div. Ct. 69**

10 Edw. 7 & 1 Geo. 5, c. 24 (*Licensing* (*Consolidation*)), s. 14. Kneeshaw *v.* Abertolli - **Lawrence J. 295**

—— —— s. 64, sub-s. 1. Chandler *v.* Emerton and Others, Justices **Div. Ct. 261**

1914.

4 & 5 Geo. 5, c. 59 (*Bankruptcy*), s. 54, sub-s. 3. Metropolis Estates Co., Ld. *v.* Wilde - - **C. A. 536**

1918.

8 & 9 Geo. 5, c. 40 (*Income Tax*), s. 33, sub-ss. 1, 3; r. 8 of No. V. of Sch. A. Southern *v.* Aldwych Property Trust, Ld. **Lawrence J. 266**

—— —— Sch. D, Rules applicable to Cases I. and II., r. 3 (*a*). Hyett (Inspector of Taxes) *v.* Lennard **Macnaghten J. 180**

—— —— Sch. D, Rules applicable to Cases I. and II., r. 9. Rex *v.* Inland Revenue Commissioners. *Ex parte* Gibbs and Others **Div. Ct. 242 and C. A. 615**

—— —— Sch. D, Rules applicable to Case III., r. 1 (*a*). Forsyth *v.* Thompson - **Lawrence J. 366**

STATUTES—*continued.*

8 & 9 Geo. 5, c. 40 (*Income Tax*), Sch. D, Case VI. Beare (Inspector of Taxes) *v.* Carter **Macnaghten J. 187**

1922.

12 & 13 Geo. 5, c. 17 (*Finance*), s. 21. Inland Revenue Commissioners *v.* Payton - **Lawrence J. 372**

12 & 13 Geo. 5, c. 46 (*Electricity* (*Supply*)), s. 13 (*a*). Rex *v.* Electricity Commissioners. *Ex parte* Chester Corporation - **Div. Ct. 247**

1925.

15 Geo. 5, c. 23 (*Administration of Estates*), s. 41. Jopling *v.* Inland Revenue Commissioners **Lawrence J. 282**

15 & 16 Geo. 5, c. 49 (*Supreme Court of Judicature* (*Consolidation*)), s. 89 (*b*). Johnston *v.* Chas. Osenton & Co. **C. A. 123**

15 & 16 Geo. 5, c. 84 (*Workmen's Compensation*), s. 6, sub-ss. 1, 2. Heywood and Bryett, Ld. *v.* A. Heywood & Son - **C. A. 145**

15 & 16 Geo. 5, c. 90 (*Rating and Valuation*), s. 31, sub-s. 4. Hulme *v.* Bucklow Area Assessment Committee and Another **Div. Ct. 255**

—— —— s. 38. Rex *v.* Westminster (City) Assessment Committee. *Ex parte* Grosvenor House (Park Lane), Ld. - - **Div. Ct. 350**

1926.

16 & 17 Geo. 5, c. 22 (*Finance*), s. 33, sub-s. 1. Harling *v.* Celynen Collieries Workmen's Institute **Lawrence J. 86 and C. A. 465**

16 & 17 Geo. 5, c. 51 (*Electricity* (*Supply*)), s. 18, sub-s. 2. Rex *v.* Electricity Commissioners. *Ex parte* Chester Corporation - **Div. Ct. 247**

1927.

17 & 18 Geo. 5, c. 21 (*Moneylenders*), s. 6. Manley Estates, Ld. *v.* Kayton **C. A. 168**

Allighan and Another *v.* London and Westminster Loan and Discount Co., Ld. - **Singleton J. 630**

STATUTES—*continued.*

1928.

18 & 19 Geo. 5, c. 44 (*Rating and Valuation* (*Apportionment*)), s. 2, sub-s. 2. Wimborne and Cranborne R. D. C. *v.* East Dorset Assessment Committee - - - **C. A. 420**

1932.

22 & 23 Geo. 5, c. 55 (*Administration of Justice*), s. 1, sub-s. 1. Johnston *v.* Chas. Osenton & Co. **C. A. 123**

1934.

24 & 25 Geo. 5, c. 41 (*Law Reform* (*Miscellaneous Provisions*)), s. 1. Mills *v.* Stanway Coaches, Ld., and Another - - - **C. A. 334**

24 & 25 Geo. 5, c. 53 (*County Courts*), s. 100. Friis *v.* Paramount Bagwash Co., Ld. (No. 2) - **C. A. 654**

—— —— s. 111, sub-s. 1. Lee and Another *v.* Proprietors of Hay's Wharf, Ld. - - **C. A. 306**

1936.

26 Geo. 5 & 1 Edw. 8, c. 34 (*Finance*), s. 18. Gasque *v.* Commissioners of Inland Revenue **Macnaghten J. 80**

—— —— s. 20. Inland Revenue Commissioners *v.* Payton **Lawrence J. 372**

26 Geo. 5 & 1 Edw. 8, c. 51 (*Housing*), s. 2, sub-s. 1. Rousou *v.* Photi. Gort Estates Co. (Third Party) **C. A. 379**

1937.

1 Edw. 8 & 1 Geo. 6, c. 54 (*Finance*), s. 15, sub-ss. 1, 5. Boarland *v.* Pirie, Appleton & Co., Ld. Stemco, Ld. *v.* Hyett **C. A. 491**

—— —— s. 19, sub-s. 1; Sch. IV., para. 7. Inland Revenue Commissioners *v.* Imperial Tobacco Co. (of Great Britain and Ireland), Ld. **Lawrence J. 287**

1 Edw. 8 & 1 Geo. 6, c. 67 (*Factories*), s. 54. Fulham Borough Council *v.* A. B. Hemmings, Ld. **Humphreys J. 669**

—— —— s. 151, sub-ss. 1, paras. (*a*), (*b*), 9. Wood *v.* London County Council **Tucker J. 642**

STATUTES—*continued.*

1938.

1 & 2 Geo. 6, c. 53 (*Hire Purchase*), ss. 10, 11. SMART BROTHERS, LD. *v.* PRATT AND ANOTHER **C. A. 498**

1939.

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1. KOHNSTAMM (R. & A.), LD. *v.* LUDWIG KRUMM (LONDON), LD. - **Macnaghten J. 359**

—— —— s. 1, sub-s. 2. S. & A. SERVICES, LD. *v.* DICKSON - - **C. A. 219**

STATUTES—*continued.*

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1, sub-ss. 1, 4. BRANDON *v.* REIDY - - **C. A. 194**

2 & 3 Geo. 6, c. 89 (*Trading with the Enemy*), s. 1. HINDLEY & CO., LD. *v.* GENERAL FIBRE CO., LD. **Atkinson J. 517**

—— —— s. 1, sub-s. 2 (*a*) (iii.), proviso (ii.). KOHNSTAMM (R. & A.), LD. *v.* LUDWIG KRUMM (LONDON), LD. **Macnaghten J. 359**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

THE PUBLIC TRUSTEE *v.* PEARLBERG.

C. A.

1940
Feb. 21, 22,
23;
March 6.

[1936. P. 2127.]

Vendor and purchaser—Contract for purchase of land—Conditions as to rescission—Payment of deposit by purchaser—Failure of purchaser to complete—Action for specific performance—No right in vendor to rescind or forfeit deposit until discontinuance of action.

Under a contract for the sale and purchase of land it was provided that if a purchaser failed to comply with any of the conditions of sale " his deposit may be absolutely forfeited to the " vendor and the contract rescinded ". The purchaser paid the deposit, but failed to complete. The vendor commenced an action in which he claimed specific performance. Later he served a notice on the purchaser to complete the purchase, and that if he failed to do so, he, the vendor, would rescind the contract

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and that the deposit would be forfeited under the terms of the contract:—

Held, reversing Croom-Johnson J., that the purchaser could not rescind the contract and that the deposit could not be forfeited while the writ claiming specific performance was on the file.

Appeal from Croom-Johnson J.

This appeal arose on a counterclaim by H. H. Pearlberg, in a suit in which the Public Trustee, acting as the trustee of one Mr. Scholfield, who was the executor of one Thomas Greaves, had successfully claimed 47*l.* 13*s.* 7*d.*, half-year's ground rent, less tax, on certain property. On the counterclaim Pearlberg claimed 240*l.*, the amount of a deposit paid by him to Greaves on January 29, 1932.

The contract, under which the deposit was paid, was for the sale by Greaves to Pearlberg of certain freehold premises, subject to a term of 999 years, for 2400*l.* The date of completion was stated in the contract to be March 1, 1932. By clause 27 it was provided that if the purchaser should neglect or fail to comply with any of the conditions of sale, the vendor "may give him notice in writing to remedy such neglect or "failure, and if after the expiration of 14 days from the receipt "of such notice the purchaser shall still be in default, his deposit "may be absolutely forfeited to the vendor and the contract "rescinded." The purchaser failed to complete the purchase on the due date. On April 6 the vendor's solicitors gave notice to Pearlberg that unless he completed they would take action under the agreement, and on June 28 they notified his solicitors that they had received instructions to commence proceedings for specific performance of the contract, and, in addition or in substitution, damages. On July 7 Greaves issued his writ accordingly. Shortly after he died, and on November 9, Scholfield, acting as Greaves' executor, issued a fresh writ for the same relief in the Palatine Court of Lancaster. That writ was not served on Pearlberg until July 4, 1933. On July 12 appearance thereto was entered for Pearlberg. No proceedings on this writ were ever taken, but it was never taken off the file. On October 13, 1933, Scholfield gave notice to the purchaser under clause 27 that unless the contract was completed within fourteen days it would be rescinded and the deposit forfeited.

Considerable correspondence ensued between the parties and their solicitors, and various fresh proposals were made to settle the matter, but nothing effective was done, until the Public Trustee, acting as executor for Scholfield who died on April 7, 1935, commenced proceedings, and Pearlberg counterclaimed, as mentioned above.

Croom-Johnson J. dismissed the counterclaim.

Pearlberg appealed in respect of the forfeiture of the deposit.

The appeal was heard on February 21, 22, 23, 1940.

A. T. Denning K.C. and *D. Weitzman* for the appellant. Two points are taken on this appeal, namely, first, that by bringing an action for specific performance the vendor elected to treat the contract for the sale and purchase of land as still on foot. This continued as long as the action remained in being with the consequence that the notice to rescind and forfeit the deposit while the action was still on foot was void. Secondly, in order to enforce forfeiture the vendor must be ready and willing to complete the contract and as in this completion statement an excessive amount was asked for, the rescission or forfeiture cannot hold good.

[LUXMOORE L.J. Do you say that the existence of a writ for specific performance or damages prevents the notice to rescind from having validity ?]

Yes. It is a case of election and the vendor having elected to keep the contract on foot cannot depart from that without first having the action he has brought to enforce the contract put an end to : see *Mayson* v. *Clouet* (1) where Lord Dunedin says (2) : "The law is quite plain. If one party to a contract "commits a breach then if that breach is something that goes "to the root of the contract, the other party has his option. He "may still treat the contract as existing and sue for specific "performance ; or he may elect to hold the contract as at an "end—i.e., no longer binding on him—while retaining the "right to sue for damages in respect of the breach committed." This law originated with *Warde* v. *Dixon* (3) : see also *Gray* v.

(1) [1924] A. C. 980.
(2) Ibid. 985.
(3) (1858) 28 L. J. (Ch.) 315.

Fowler. (1) In the last named case Kelly C.B. refers (2) to a rule of the Court of Chancery that "the seller cannot, while "his bill for specific performance is pending, put an end to the "contract": see also *Motor Carriage Supply Co.* v. *British and Colonial Motor Co.* (3), which, however, is not directly in point. The effect of an alternative claim for damages is considered in *Hipgrave* v. *Case.* (4) In applying for specific performance the plaintiff would have to say that he was ready and willing to complete. Under Order XIX., r. 14, there must be that averment implied, though it need not be expressed: see also Order XIX. of the Palatine Rules.

[SLESSER L.J. If a writ claimed specific performance or alternatively rescission, could the vendor be said to have affirmed the contract?]

No. But here the plaintiff asks for specific performance or damages in addition to or in substitution for specific performance and in that case both alternatives involve affirming the contract. Here the plaintiff, while affirming the contract, acted in a way contrary to it. *Isaacs* v. *Towell* (5) and *United Australia, Ld.* v. *Barclays Bank* (6) assist the appellant's contention and showed that on the writ in the present case there was an unequivocal election.

[GODDARD L.J. Is it the real finding of the judge in the present case that the appellant had himself abandoned the contract?]

The only finding was that the appellant could not pay in the fourteen days allowed him by the plaintiff. The appellant's delay in setting up the present claim cannot entitle the Court to infer an abandonment by him of the contract. The terms on which there can be forfeiture of deposit depend on the contract: *Howe* v. *Smith.* (7) The contract provides in express terms when the deposit can be forfeited.

[He also referred to *Scarf* v. *Jardine.* (8)]

Neville Gray K.C. and *G. Maddocks* for the respondent. The principle of election does not apply in this case in the way

(1) (1873) L. R. 8 Ex. 249.
(2) Ibid. 272.
(3) (1901) 45 Sol. J. 672.
(4) (1885) 28 Ch. D. 356.
(5) [1898] 2 Ch. 285.
(6) [1939] 2 K. B. 53.
(7) (1884) 27 Ch. D. 89.
(8) (1882) 7 App. Cas. 345.

suggested in the appellant's argument. The true principle is that a person cannot blow hot and cold at the same time and not that they cannot first blow hot and then cold. It is not a question of election out and out once for all.

[Slesser L.J. As long as the writ for specific performance remains on record is not the respondent continuously electing ?]

No. A writ is very different from the old bill in Chancery proceedings and leaves it open what the ultimate intention is. The writ may be issued as a mere threat without any intention to enforce it. It is not a question of a true election here, as otherwise the person who exercised the right to elect could not go back on it afterwards. A person must not approbate and reprobate at the same time. Taking a step in an action for specific performance is different from the issue of a writ and nothing more. In all the cases cited there was sufficient evidence of a strong intention to enforce the contract of sale and purchase: see *Gray* v. *Fowler*. (1)

[Goddard L.J. The issue of a writ is sufficient evidence of an intention: *Scarf* v. *Jardine*. (2)]

The whole question is whether at the date of repudiation, the vendor is still seeking to enforce the contract.

But if this first point is wrong, there has been laches in that the defendant never insisted on the contract and so led the plaintiff to regard his course of conduct as acquiesced in. There was good ground for rescission and forfeiture as the judge has found that the defendant could not find the purchase price. What he did amounted to a repudiation of the contract and he cannot set it up now. Actual discontinuance of an action is not necessary, if intention to discontinue is shown, as it was here. By October, 1933, the purchaser was so far out of time as regards completion that he could not have obtained specific performance and his deposit was forfeited: *Howe* v. *Smith* (3), and see Lord Parker of Waddington in *Stickney* v. *Keeble*. (4) The appellant has no merits in this case, and the Court ought not to exercise its discretion in his favour.

Denning K.C. in reply. There has been repudiation of the

(1) L. R. 8 Ex. 249.
(2) 7 App. Cas. 345.
(3) 27 Ch. D. 89.
(4) [1915] A. C. 386, 415.

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contract. It is true that the defendant's solicitor said that the defendant could not complete within the time allowed and this is all that the judge has found. This is not repudiation but asking for more time.

Further, in order to give a right to forfeit the deposit, it is not enough that both sides treated the contract as at an end. The respondent had no right to make time of the essence of the contract while an action for specific performance was pending; nor was he entitled to give notice of rescission and forfeiture of the deposit.

Cur. adv. vult.

1940. Mar. 6. Slesser L.J. This appeal arises on a counterclaim by Henry Hyman Pearlberg, in a suit in which the Public Trustee, who on the death of one Mr. Scholfield, executor of the vendor, became executor of Scholfield, and so administered the vendor's estate, had successfully claimed 47*l.* 13*s.* 1*d.*, the half-year's ground rent, less tax on certain property. Nothing here turns upon that claim, which was allowed with costs. On the counterclaim Mr. Pearlberg claimed 240*l.*, the amount of a deposit paid to a Mr. Thomas Greaves by him on January 29, 1932, in respect of the sale by Greaves to Pearlberg of a factory called the Albany Mill, Oldham, together with interest at 4 per cent. from that date and damages. The counterclaim was dismissed with costs. The present appeal is limited to so much of the counterclaim as concerns the deposit.

The contract, under which admittedly the deposit was paid, was for the sale and purchase of a freehold cotton-mill, subject to a term of nine hundred and ninety-nine years, with the benefit of a yearly rent of 271*l.* 5*s.* reserved by the lease creating the term. The sale was to be for 2400*l.*, and a receipt for the deposit was given to the purchaser on January 29, 1932, by the vendor's solicitors. The date of completion was stated in the contract to be March 1, 1932. By clause 27 it was provided that if the purchaser should neglect or fail to comply with any of the conditions of sale, the vendor "may "give him notice in writing to remedy such neglect or "failure, and if after the expiration of 14 days from the "receipt of such notice the purchaser shall still be in default, "his deposit may be absolutely forfeited to the vendor and "the contract rescinded."

The date for completion having passed, on April 6, 1932, Messrs. Scholfields for the vendor gave notice to Mr. Pearlberg that unless he completed they would take action under the agreement; and on June 28, 1932, they notified the solicitors of the purchaser that they had received instructions to commence proceedings for specific performance of the agreement; and in addition or in substitution, damages.

On July 7 Mr. Greaves issued his writ accordingly: but the learned judge says he is not satisfied that that writ was ever served. Shortly after Mr. Greaves died, and on November 9, 1932, Mr. Scholfield, as executor of Mr. Greaves, issued a fresh writ for the same relief in the Palatine Court of Lancaster; which writ was not served upon Mr. Pearlberg until July 4, 1933. On July 12 appearance thereto was entered for Mr. Pearlberg. No proceedings on this writ were ever taken: but it was never taken off the file, and remained operative, though dormant at all material times.

Thereafter, on October 13, 1933, Mr. Scholfield, in place of the vendor, gave notice to the purchaser under clause 27 of the agreement, that unless payment was made in fourteen days, the contract would be rescinded and the deposit forfeited. On a further appeal by the purchaser on October 24 for time, on October 25, 1933, Mr. Scholfield's solicitors say that if the purchaser could raise the necessary funds within say ten days, they are of opinion that the vendor might be prepared to make a fresh agreement with the purchaser, and on completion give him credit for the deposit already paid: but on October 28 they write: "As your client has failed to comply with the "terms of the notice dated 13th October, we have received "definite instructions from our client that the contract must "be rescinded and the deposit forfeited. The matter must, "therefore, be considered as at an end." Nevertheless, on November 1, 1933, the purchaser says through his solicitors that he is prepared to complete on or before the 30th, and to pay the further sum of 200*l.* immediately on account. This

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offer is rejected on November 2 by Mr. Scholfield, whose solicitors write: "Our client, however, is not prepared in any "circumstances whatever to re-open the question of the "contract which has been rescinded by the notice served on "your client." The vendor then goes on to offer what he describes as "an entirely new contract".

On November 3, 1933, in answer, the purchaser still says he is willing to complete the purchase; but suggests that if a further contract is to be entered into "we shall be glad to "know if you will be prepared to sell at the original price "of 2400*l.*, plus interest, and to give credit for the deposit "already paid, less your costs." The suggestion for a new contract is again discussed by the parties on November 6, 1933, and on November 11, 1933, the purchaser points out for the first time that he has not been given notice of discontinuance of the writ for specific performance; and intends to tender the money in respect of the purchase.

Mr. Pearlberg, in his evidence at the trial, tried to prove that he did so tender; but the learned judge rejected all his evidence, and held that he did not tender, and that he knew he could not complete in accordance with the notice, and had no money available. I exclude, therefore, from my consideration any question of Mr. Pearlberg tendering any money at all; and assume that he ignored the notice of October 13, 1932; and have considered the history of the case from the correspondence alone.

From the letters and notice, it is clear that, by the notice of October 13, 1933, Mr. Scholfield purported to rescind the contract. On October 28, after the fourteen days had expired, he says the matter must now be considered as at an end. He is prepared to negotiate for "an entirely new contract", and so told the purchaser on November 2, but beyond question had repudiated the original agreement.

If he was entitled to rely on the notice of October 13, he was within his rights in so doing, and in forfeiting the deposit: but if, as argued for the appellant, that notice was a nullity, the Public Trustee in place of Mr. Scholfield can show no case for retaining the deposit paid upon an agreement which

Mr. Scholfield has purported to rescind; and must fail on this appeal.

The whole question, therefore, in my opinion turns upon the validity of the notice. That Mr. Pearlberg was in default is not disputed: but it is said for the appellant that by failing to discontinue the action for specific performance, further time has been given to Mr. Pearlberg to complete before the hearing of that action; and that the plaintiff had taken out of his own hands, and relegated to the Court, the burden of deciding at what date the contract should be completed.

Had the action been started by bill in the Court of Chancery before the Judicature Acts, it can scarcely be doubted that, in the circumstances of the case, the notice served on Mr. Pearlberg under clause 27 of the contract of January 29, 1932, would be inoperative so long as the bill was on the file of the Court. Authority for this proposition is to be found in the case of *Gray* v. *Fowler* (1), approving *Warde* v. *Dixon* (2), to that effect, a doctrine now to be found in all the current textbooks. A vendor may rescind notwithstanding a bill to have been filed, if and when the bill is dismissed. As Kelly C.B. points out in *Gray* v. *Fowler* (3), speaking of the practice of the Court of Chancery: "The seller cannot, while his bill for specific "performance is pending, put an end to the contract; he must "first dismiss his bill with costs. But the whole meaning and "essence of that rule (which is a very reasonable rule) is this: "' You cannot be acting on the contract and assuming it to "' exist, and at the same time exercising a right to put an end "' to it by rescinding it'."

In that case it was held that the seller had taken all the means in his power to obtain a dismissal of the bill with costs, and on the facts the parties were remitted to their original rights. But in the present case, the respondent has done nothing to have the writ taken off the record; nor has the purchaser in any way waived his rights to say that the vendor cannot rescind while he still has on the record a writ claiming specific

(1) L. R. 8 Ex. 249.
(2) 28 L. J. (Ch.) 315.
(3) L. R. 8 Ex. 249, 272.

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performance against him on the basis that the contract still exists; and that consequently he is entitled to say that he is not now out of time and, therefore, not in default under clause 27 of the contract.

The learned judge finds, in a passage of Kelly C.B. in *Gray* v. *Fowler* (1) authority for the proposition that by giving notice after the writ, a new ground for rescinding the contract is brought into existence. But with respect, I think this conclusion to be erroneous. The Chief Baron is there dealing with a case where, to quote his own words (2): "The state of circum-"stances under which the seller was entitled to rescind had, "at the time when the bill was filed, altogether ceased to exist, "but was now renewed and revived when the purchaser by "his answer insisted on the objection." That is to say, in *Gray* v. *Fowler* (1), notwithstanding that the seller, by filing his bill, had elected not to rescind, on the original objections to title, yet there came a time, again to quote the Chief Baron, when "the suit for specific performance is at an end; and "therefore the parties are remitted to their original rights." (3) The Court of Exchequer Chamber on the facts deciding that the defendant was entitled to rescind on account of the particular objection raised by the answer, did not question the general proposition laid down in *Warde* v. *Dixon* (4) by Kindersley V.-C., that the bill must be dismissed before the right to rescind could be exercised.

Bramwell B. in *Gray* v. *Fowler* (5), expressly speaks of the rule, declaring it thus: "You cannot rescind a contract "whilst you have a bill upon the file insisting upon it; you "must first of all get rid of the bill; that is all the rule "amounts to." Approval is also expressed by Martin B. (6) The observations of Cleasby B. (7), that "the mere circum-"stance of a bill having been filed does not prevent a vendor "from rescinding," is not inconsistent with the general rule: see *Duddell* v. *Simpson*. (8) As he states, *Warde* v. *Dixon* (4)

(1) L. R. 8 Ex. 249, 273.

(2) Ibid. 271.

(3) Ibid. 272.

(4) 28 L. J. (Ch.) 315, 322.

(5) L. R. 8 Ex. 249, 268.

(6) L. R. 8 Ex. 249, 270.

(7) Ibid. 261.

(8) (1866) L. R. 1 Eq. 578; L. R. 2 Ch. 102.

assumes that the bill must be dismissed with costs before the right to rescind can be exercised; but the vendor may recover his power to rescind provided he gets rid of his bill.

There remains the point, strenuously argued by Mr. Gray, that the principle above stated, which has been applied to bills in Chancery, cannot properly be acted upon in the case of a writ under the present procedure claiming specific performance. If the writ is equivocal in nature, whereby a statement of claim claiming rescission could be made on a writ for specific performance, I think there would be force in the argument that such a writ did not necessarily involve action on the contract, and an assumption of its existence; but, in my opinion, the writ in the Palatine Court in this case is not of that order.

The claim endorsed on the writ of November 9, 1932, was for specific performance of the agreement of January 29, 1932, and for damages in addition to, or in substitution for specific performance. The claim for damages in the alternative in my view is merely ancillary to the claim for specific performance; and the relief claimed is on the basis of the continued existence of the contract which the defendant is failing to carry out. In *Hipgrave* v. *Case* (1), the principle of *Gray* v. *Fowler* (2) was applied to a statement of claim. In that case, as here, the plaintiff claimed specific performance or damages in substitution of performance (per Earl of Selborne L.C. (3)), the only difference being that in the present claim, having gone no further than the writ, there is no express averment that the plaintiff is willing and ready to perform the contract. But even if there had been a statement of claim, by Order XIX., r. 14, of the Rules of the Supreme Court, and the corresponding practice of the Palatine Court, it is no longer necessary to plead averments, and such an averment is implicit in the claim for specific performance.

It follows that, as the action for specific performance has never been discontinued, dismissed for want of prosecution, or waived, it stands as a plea on the record asserting the existence of the contract, and asserting that the defendant is still not out of time to complete it: indeed, it is sought to make the Court compel him so to do. Consequently, owing to the absence of default on his part, in the circumstances the notice of rescission of the contract or claim to forfeit the deposit is bad. The plaintiff himself having repudiated the contract, if not by the notice, at any rate by the letter of October 28, stating that the contract is at an end, has lost his title to the deposit in lieu of the payment of the purchase-money; and the defendant may claim it back, as he has sought to do in the present counterclaim.

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(1) (1885) 28 Ch. D. 356.
(2) L. R. 8 Ex. 249.
(3) 28 Ch. D. 356, 361.

I am of opinion that this appeal succeeds.

The order of the learned judge dismissing the counterclaim must be discharged and the appeal allowed as to the sum of 240*l.* which will be ordered to be paid to Pearlberg. In our judgment there should be no costs of the counterclaim in the Court below so that if Pearlberg has paid the plaintiff such costs there must be an order for repayment of the amount so paid. We can see no ground for depriving Pearlberg of his costs of this appeal, which must be paid to him by the Public Trustee.

LUXMOORE L.J. This appeal arises out of a counterclaim made by the defendant, Henry Hyman Pearlberg, in an action brought against him in the King's Bench Division on June 9, 1936, by the Public Trustee as trustee of the will of one James Greaves, deceased. By an order dated July 3, 1936, it was ordered that the Public Trustee should be at liberty to enter final judgment for the amount of his claim in the action and costs, and it was further ordered that if the said amount and costs be paid into Court within ten days from the date of the order, execution on the judgment should be stayed pending the trial of the defendant's counterclaim. The money was duly paid into Court and the counterclaim was delivered on September 8, 1936. It was based on a written agreement dated January 29, 1932, entered into by Pearlberg and James Greaves. The agreement was annexed to printed particulars and special and general conditions of sale, and provided that Greaves should sell and Pearlberg should purchase the property described in the particulars at the price of 2400*l.*, subject as in the said particulars mentioned and also subject to the special and general conditions already mentioned so far as the same were applicable to a sale by private treaty. The particulars described a plot of land at Oldham together with a cotton-mill, called Albany Mill and other buildings erected thereon, subject to a term of nine hundred and ninety-nine years created by a lease dated May 21, 1896, but with the benefit of the yearly rent of 271*l.* 5*s.* thereby reserved. I will hereafter refer to this property as Albany Mill. The special conditions of sale stated that the purchase should be completed on March 1, 1932, and by the general conditions it was provided: (by clause 3) that the purchaser should immediately after the sale pay to the vendor a deposit of 10 per cent. of the purchase money; (by clause 4) that the purchaser should as from the day for completion be entitled to possession or receipt of the rents of the property and should pay all outgoings affecting the same, but he should not be let into actual possession or receipt of the rents until payment of the remainder of the purchase money and execution and delivery of any conveyance which ought to be executed by him; (by clause 5) if from any cause whatever, save as thereinafter provided, the purchase should not be completed at the time appointed, the purchaser should pay interest on the remainder of the purchase money at the rate of 5 per cent. per annum from that time until the same should be paid, or the vendor might at his option retain the rents or an apportioned part thereof to the actual completion of the purchase in lieu of interest, and should in that case discharge the outgoings or an apportioned part thereof to the same time. By clause 27 a power to rescind the contract for sale was conferred on the vendor in these terms: " If the purchaser shall neglect " or fail to comply with any of the conditions of sale the " vendor may give him notice in writing to remedy such " neglect or failure and if after the expiration of 14 days " from the service of such notice the purchaser shall still be " in default his deposit may be absolutely forfeited to the "vendor and the contract rescinded." The vendor was given, as an alternative to rescission, power to resell the property on the terms stated in this clause, but it is not material to refer to them.

On January 29, 1932, Pearlberg paid to Greaves a deposit of 240*l.* in accordance with the provisions of clause 3 of the general conditions. The object of Pearlberg's counterclaim is to recover (1.) the deposit of 240*l.* with interest at 4 per cent. per annum from January 29, 1932, until repayment; and (2.) general damages for the breach of the agreement of January 29, 1932, for the sale of the Albany Mill. The counterclaim was only set down for trial on May 4, 1939, as the result of an application by the Public Trustee to dismiss the counterclaim for want of prosecution. It was heard by Croom-Johnson J. on July 13, 1939. The learned judge directed that judgment should be entered for the Public Trustee on the counterclaim with costs to be taxed. Pearlberg has appealed to this Court from so much of the order as relates to the counterclaim and asks that judgment may be entered for him on the counterclaim.

It is necessary to state the history of the agreement of January 29, 1932, between its date and the date of the counterclaim. The vendor's title was accepted in due course on Pearlberg's behalf and a draft conveyance was submitted by his solicitors to the solicitors for Greaves who approved the draft. On March 23, 1932, Greaves' solicitors asked for an appointment to complete. There was some further correspondence between the solicitors without result and on June 17, 1932, Greaves' solicitors again wrote asking for an appointment to complete. Ultimately on July 7, 1932, a writ was issued in the Chancery of the County Palatine of Lancaster on behalf of Greaves as plaintiff against Pearlberg claiming specific performance of the agreement of January 29, 1932, and damages in addition to or in substitution for specific performance. The judge stated that he was not satisfied that this writ was served on Pearlberg.

Greaves died on July 24, 1932. No further step was taken in the action and no application was made to revive it. This action may for the purposes of the counterclaim therefore be treated as non-existent. Greaves appointed as his executor Thomas Henry Scholfield, a member of the firm of solicitors who had acted for him in connection with the agreement, and on November 9, 1932, Scholfield issued a new writ in the Chancery of the County Palatine of Lancaster against Pearlberg asking for precisely the same relief as was asked by the earlier writ. Nothing further was done in the matter until July 4, 1933, when the writ in the second action was served on Pearlberg, who entered appearance to it on July 12, 1933. On October 13, 1933, a notice on behalf of Scholfield was served on Pearlberg requiring him " forthwith to comply with "the terms of the agreement of the 29th January, 1932, and "to complete the purchase of the Albany Mill, the day fixed "by the contract for completion being now long past." The notice ended with this paragraph : " We hereby give you "further notice that should you fail to complete the said "purchase within 14 days from the service upon you of this "notice the said Thomas Henry Scholfield will rescind the "contract and the deposit paid by you will be forfeited "under the terms of clause 27 of the General Conditions of "Sale of the contract." This notice apparently elicited a request from Pearlberg for a completion statement up to Friday, October 27, 1933, for on October 19, 1933, Scholfield's solicitors wrote to Pearlberg a letter enclosing such a statement. The letter asked that the engrossment of the draft conveyance which had already been approved should be sent for execution by the vendor and that an appointment to complete should be made. The completion statement enclosed was not in accordance with the agreement of January 29, 1932, in that it required payment of the sum of 303*l.* 4*s.* 2*d.* in respect of the ground rent of the Albany Mill which had not been received by Pearlberg, and the sum of 20*l.* for the costs of the second action, the total sum claimed to be payable by Pearlberg on completion being 2483*l.* 4*s.* 2*d.*

On October 24, 1933, Pearlberg's solicitors wrote to Scholfield's solicitors a letter saying that the purchaser had informed them of his inability to find the balance of the purchase price

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within the fourteen days mentioned in the notice and asking for an extension of time for a fortnight or three weeks. They pointed out that the completion statement was incorrect and asked what steps had been taken against the liquidator of Albany Mills, Ld., the company which had been in occupation of the Albany Mill, by way of protection of the rent owners' rights. To this letter Scholfield's solicitors replied on October 25, 1933, that if Pearlberg could raise the necessary funds within ten days they were of opinion that Scholfield would be prepared to make a fresh arrangement with him and on completion give him credit for the deposit already paid. On October 28, 1933, Scholfield's solicitors wrote again to Pearlberg's solicitors and said: "As your client has failed "to comply with the terms of the notice dated the 13th "October we have received definite instructions from our "client that the contract must be rescinded and the deposit "forfeited. The matter must therefore be considered as at "an end." Apparently there were conversations between the solicitors, because on November 1, 1933, Pearlberg's solicitors wrote to Scholfield's solicitors a letter in which they referred to conversations, and stated that their client was prepared to complete on or before the 30th instant and to pay the further sum of 200*l*. immediately on account. This letter was answered on the following day by a letter stating that Scholfield was not prepared "to open the question of the contract which "has been rescinded by the notice served on your client". The letter goes on to suggest that if Pearlberg still desired to purchase the property he must enter into a new contract. The subsequent correspondence suggests that Pearlberg might be willing to enter into a further contract, but no new contract was made.

On November 11, 1933, Pearlberg wrote to Scholfield's solicitors pointing out that notice of discontinuance of the second action had not been given to him, and that before such a notice as that of October 13, 1933, could be given, notice of discontinuance of that action was necessary. He stated that he proposed to tender the purchase money under the purchase agreement on November 13 and asked for a corrected completion statement. The judge has held that no tender was made on November 13, 1933, nor on any other date. He declined to accept the testimony of Pearlberg unless it was supported by documentary evidence, and having read the shorthand note of that gentleman's examination and cross-examination I appreciate entirely the reason for this finding.

From the last mentioned date onwards the question of the completion of the agreement of January 29, 1932, remained so far as both parties were respectively concerned in a state of quiescence. On January 14, 1935, Scholfield sold the Albany Mill to a third party. Scholfield died on April 7, 1935, having appointed the Public Trustee as his executor. The Public Trustee thereby became the legal personal representative of Greaves. On September 5, 1935, Pearlberg wrote to Scholfield & Co. stating that he was prepared to complete the purchase of the property "which I have been "anxious to do all along, but which you have prevented my "so doing owing to your action for specific performance", a statement which is difficult to understand or to reconcile with the facts. Pearlberg also stated that he proposed forthwith to take proceedings for specific performance of the contract. No such step was taken nor was anything further heard about the contract until the Public Trustee, who had become the trustee of the will of James Greaves in the place of Scholfield and also the legal personal representative of James Greaves by devolution, instituted the action out of which Pearlberg's counterclaim has arisen.

As I have already stated there was great delay in bringing the counterclaim to trial and it was only set down after an application by the Public Trustee for its dismissal for want of prosecution.

Mr. Denning, who argued the case on behalf of Pearlberg in this Court, very properly admitted that it was impossible for him to put forward a claim for damages for breach of the agreement of January 29, 1932, with any hope of success, having regard to Pearlberg's delay in the prosecution of his claim, but he contended that there was no valid rescission of the agreement of January 29, 1932, in accordance with any of its provisions, and that consequently Pearlberg had a legal right to recover his deposit and that such right was not and could not be affected by reason of any delay by Pearlberg in the prosecution of his claim. It is therefore necessary to consider the effect on the contract of the notice of October 13, 1933, and the notice of October 28, 1933, that the contract was rescinded. If there had been no pending action by Scholfield for specific performance there could, I think, be no doubt but that both the notice limiting a time for completion and the rescission after failure to comply with that notice were valid; but it is, I think, well settled that a vendor cannot rescind a contract for the sale of land where he has himself brought an action for specific performance which is pending at the date of the alleged rescission, for the claim for specific performance of necessity implies an affirmance of the contract.

The rule is stated in these terms in Williams on Vendor and Purchaser, 4th ed., vol. i., p. 227: "If the vendor takes "proceedings to enforce the contract at law or in equity, he "waives his right to rescind: though he may revert to it, if "he procures his proceedings to be effectually discontinued "at his own cost before the matter comes on to be heard." Reference is made to *Warde* v. *Dixon* (1) and *Gray* v. *Fowler* (2) as supporting this statement. Kindersley V.-C. in the former case said (3) that "he would have to dismiss his bill with costs "before he could say he is entitled to rescind the contract." Each member of the Court of Exchequer Chamber which decided *Gray* v. *Fowler* (2) refers to the rule in express terms. The reason for the rule is stated by Kelly C.B. in the following passage (4): "Then we are met with a difficulty arising out "of the practice of the Court of Chancery, that the seller "cannot, while his bill for specific performance is pending, "put an end to the contract; he must first dismiss his bill "with costs. But the whole meaning and essence of that "rule (which is a very reasonable rule) is this: 'You cannot "'be acting on the contract and assuming it to exist, and at "'the same time exercising a right to put an end to it by

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(1) 28 L. J. (Ch.) 315.
(2) L. R. 8 Ex. 249.
(3) 28 L. J. (Ch.) 315, 322.
(4) L. R. 8 Ex. 249, 272.

"rescinding it'." This of course only deals with the question of rescission and not with the question whether a new time for completion can be fixed by the vendor, who has started an action for specific performance, while that action is pending. Where (as in the present case) time for completion is not of the essence of the contract, it is always open to a vendor to fix a reasonable time for completion and so make time of the essence, but where a vendor starts an action for specific performance it appears to me that the issue of a writ is equivalent to a notice to the purchaser that he must complete his purchase at a time which will be fixed by the Court if the vendor succeeds in his action. Having given notice of this fact it seems to me to be impossible, while the action is pending, for the vendor to fix some other and shorter time for completion under some provision of the contract. Of course, if the action for specific performance is discontinued, the right to fix a new time for completion under the contract must necessarily revive. Mr. Gray on behalf of the plaintiff did not challenge the existence of the rule as to the vendor's right to rescind while an action for specific performance instituted by him is pending, but he argued that it did not apply if the vendor showed that he had changed his mind at the time he purported to rescind and did not then intend to continue his action. In support of this argument he relied on the fact that in *Warde* v. *Dixon* (1) as well as in *Gray* v. *Fowler* (2), the vendor was proceeding by bill of complaint, which required an averment that the vendor was ready and willing to carry out his part of the contract, whereas no such averment was implicit in the writ. I do not think there is any solid foundation for any such distinction, for the relief of specific performance can only be obtained by a person who can perform his contract, subject only to the question of title if the title has not already been accepted. I agree that if the writ is equivocal and there is a claim for specific performance with an alternative claim for rescission, the vendor has not in fact made a definite choice in favour of the enforcement of the contract. In the present case the writ is for specific performance

(1) 28 L. J. (Ch.) 315.

(2) L. R. 8 Ex. 249.

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of the contract and for damages in addition to or in substitution for specific performance. On such a writ I am satisfied that the reference to damages in substitution for specific performance has no reference to a possible claim to rescission, and would not include it. In *Hipgrave* v. *Case* (1) it was held that a claim for specific performance or in the alternative for damages must be treated as one for specific performance, with a claim for damages in the alternative as a substitute for specific performance. In the present case the words "in substitution for specific performance" which were absent from the claim in *Hipgrave* v. *Case* (1) are expressly inserted in the writ. In these circumstances I can see no ground to support Mr. Gray's contention that the writ is either equivocal or is in a form in which he could, by the statement of claim when delivered, ask for rescission of the contract. Mr. Gray did not find any adequate argument in answer to the question whether a vendor who has instituted an action for specific performance can, while that action is pending, give a notice making time for completion of the essence of the contract, in view of the fact that it is for the Court to fix the time for completion in such an action.

It follows from what I have said that in my judgment both the notice by which Scholfield purported to fix a date for completion and to rescind the contract, because of Pearlberg's failure to complete by that date were ineffectual, and that there has therefore been no valid rescission under clause 27 thereof. If this is so there cannot have been a forfeiture of the deposit by reason of the notice and Pearlberg's failure to comply with it. Although *Gray* v. *Fowler* (2) was cited to Croom-Johnson J., it does not appear that his attention was called to that part of the judgment which states the rule to which I have referred. The passage in *Gray* v. *Fowler* (2) to which the judge was referred is in the judgment of Kelly C.B. (3) and is as follows: "Then it is further "said by the plaintiff: 'You have filed a bill for specific "'performance against me, and therefore you are not entitled

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(1) 28 Ch. D. 356.
(2) L. R. 8 Ex. 249.
(3) Ibid. 271.

" ' to rescind; you call upon me to act upon the contract, " ' and at the same time claim to rescind and put an end to it.' " But the state of circumstances under which the seller was " entitled to rescind had, at the time when the bill was filed, " altogether ceased to exist, but was now renewed and revived " when the purchaser by his answer insisted on the objection." This passage has no bearing on the existence of the rule that a vendor cannot rescind a contract, specific performance of which he has sought to enforce by pending action, and is in fact directed to a different point. What the learned judge is saying is that the vendor by bringing his suit for specific performance was not entitled to rescind the contract in respect of objections made by the purchaser before the vendor's suit was instituted, but that he became entitled to rescind in respect of objections made subsequently to the institution of the suit, provided that the suit had at the time of rescission been dismissed: for the Chief Baron immediately after the passage which I read last states the difficulty caused by the rule and after pointing out that the vendor's suit for specific performance must be dismissed before rescission, proceeds to demonstrate that the vendor had, in the particular case under consideration, done everything in his power to obtain a dismissal of his bill with costs, although he had been unable to do so by reason of the death of the purchaser and the attitude adopted by his executor since the vendor had offered to pay such executor the costs, which would have been payable to the deceased purchaser, if he had been alive and the suit had been effectively dismissed with costs. He further points out that before the vendor rescinded the contract the action for specific performance had, by reason of an order obtained by the purchaser's executor, been dismissed without costs. Mr. Gray also argued that Pearlberg had in fact agreed with Scholfield that the contract was at an end, and he relied on the correspondence to which I have already referred, passing between the solicitors of the respective parties at the time of the notice. I am quite unable to spell out of that correspondence any concluded agreement to put an end to the contract of January 29, 1932, and to negotiate for a new agreement on the footing that the contract had been validly rescinded. The learned judge has stated in his judgment that "the defendant (i.e., Pearlberg) had long since recognised "that the position was that the contract had been lawfully "rescinded and that he had instructed a solicitor to negotiate "for a new contract on the basis that the old one had been "determined." If, as I hold, there was no valid rescission of the old agreement and there was no new agreement entered into, I am unable to see any ground on which Pearlberg can be precluded from enforcing his legal right to have his deposit of 240*l*. returned to him. His legal right is not statute barred and he is entitled to recover that amount. So far as he claims to recover interest in respect of it, the matter is at the discretion of the Court, under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41). Having regard to the fact that Pearlberg has delayed bringing his claim until long after the death of both Greaves and Scholfield and to his unwarranted delay in bringing his counterclaim to trial, we are of opinion that no interest should be allowed.

GODDARD L.J. It is unnecessary for me to recapitulate the facts; but I will state my reasons shortly for agreeing that this appeal succeeds.

The doctrine laid down in *Warde* v. *Dixon* (1) and *Gray* v. *Fowler* (2) applies not only to proceedings in equity, but is also a rule of the Common Law. If one contracting party, either expressly or by conduct, repudiates a contract, the other can either accept the repudiation and treat the contract as rescinded, or can refuse to do so, and regard the contract as still alive, so that his rights will fall to be determined when the time for performance arrives. He cannot, however, insist on performance and at the same time adopt the remedies open to him on rescission. Applying that rule to a case where equity would entertain a claim for specific performance, it follows that if a vendor, by applying for that remedy, asserts that he regards the contract as subsisting, he loses his right to

(1) 28 L. J. (Ch.) 315. (2) L. R. 8 Ex. 249.

forfeit a deposit, on the footing that the contract has been rescinded by the purchaser's default. But he may resile from the position he has thus taken up, and if he abandons his action by discontinuing it in the manner provided by the Rules of Court he can, if the purchaser is still at fault, accept the repudiation and forfeit the deposit. If he so acts, he will have to pay the costs of the proceedings which have become abortive, because he himself has put an end to his cause of action. The present case forms a good example of the necessity for this rule. When the plaintiff, having given his notice purporting to forfeit the deposit, delivered a completion statement, he claimed that the defendants should pay the costs of the abortive action. I can see no possible ground on which he could base such a claim. If he desired to rescind and forfeit the deposit, the action was wholly unnecessary. And he could no longer persist in his suit because, by his own volition, he had extinguished his cause of action. If he did not proceed with the action, the defendant could, no doubt, obtain an order for dismissal for want of prosecution; or if a statement of claim had been delivered, he could have put in a defence alleging that the cause of action had been extinguished; and then, if the plaintiff still did not discontinue, I suppose the defendant could set the case down, so as to obtain judgment for his costs. This, I think, shows the anomalous, and indeed absurd, position which results from attempting to rescind the contract while the action is still in being.

Mr. Neville Gray argued that there was a difference between merely issuing a writ, unaccompanied or not followed by a statement of claim, and filing a bill in Chancery under the old procedure. I cannot agree. Under Order I. of the Rules of the Supreme Court, an action in the Supreme Court is substituted for a proceeding by bill in the High Court of Chancery; and an action is, by Order II., commenced by a writ of summons: and the procedure in the Palatine Court is, I understand, the same. There is no magic in the form of the process: what matters is, that the proceeding asserts the existence of the contract. I do not stay to consider whether

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it was open to the plaintiff to expand the relief claimed on the writ by asking in his statement of claim for the alternative relief of rescission; because one has, in my opinion, only to see what was being asserted by the plaintiff when he purported to rescind. The relief claimed by the writ is unambiguous: The plaintiff claims to have the contract specifically performed, or to have damages in lieu of that remedy, which I think means no more than that if the Court considers damages an adequate remedy, he will ask that they be awarded to him.

Where, I think, the learned judge was wrong is, that he misapprehended the true nature of the rule; he seems to me to have thought that a vendor can, at one and the same time, claim the remedy of specific performance, and, while so claiming, can enforce the inconsistent right to rescind and forfeit the deposit. From some passages in the judgment I think he may have had in mind the doctrine prevailing between mortgagee and mortgagor: that the former may exercise all his rights at once. No one doubts that a plaintiff in an action for specific performance can claim the alternative remedy of rescission: but that is no more than saying that if the Court, for any reason, thinks that though the defendant is in default, specific performance cannot be granted, then the plaintiff asks that it may be declared that he can rescind the contract and exercise his rights of forfeiture. No inconsistent position arises because, if the judgment is for rescission, it follows ex hypothesi that the claim for specific performance is thereby ended.

The plaintiff then having rescinded the contract when he was not entitled to do so, it follows that there can be no defence to an action by the defendant for a return of the deposit as money had and received. Laches forms no bar to a legal claim: and I cannot, on the facts proved, find that the defendant so acquiesced that we ought to infer an agreement by him that the matter should be ended on the terms that the action should be dropped and the deposit taken by the plaintiff instead and in satisfaction of whatever rights he might have. I only wish I could, as it is clear that this defendant is a most unsatisfactory person, and never had any real intention of completing.

Whether a plea of estoppel would have succeeded, I need not inquire, as it was neither pleaded nor was evidence led on that issue. But in view of the shifty conduct of the defendant, and his really unpardonable and unexplained delay, especially when it is remembered that he made no claim in the lifetime of the vendor, nor even of the vendor's executor, and the embarrassment which this claim must cause to the present representatives of the vendor's estate and the beneficiaries, I agree that he ought not to have any costs of the action; and for the same reasons, no interest on the amount he has recovered.

Appeal allowed.

Solicitors for the appellant: *Linsley-Thomas, Heald & Co.*

Solicitors for the respondent: *Hewitt, Woollacott & Chown for T. H. Scholfield & Co., Manchester.*

P. J. B.

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POOLEY *v.* BRYNING.

Practice—Action begun in district registry—Parties and witnesses all in district—Defendant's solicitors in London—Action transferred to London on notice by defendant—Plaintiff's application to transfer to district registry—No "good cause" for transfer to district registry —R. S. C., Order XXXV., *r.* 13, *sub-r.* 3, *r.* 14.

An action was begun in a district registry at a place where the parties and all the witnesses resided, the defendant's solicitors being a London firm. The defendant appeared in the registry and there gave notice under Order XXXV., r. 14, that he desired the action to be removed to London. On its being so removed the plaintiff applied, under the proviso to r. 14, for a transfer to the district registry. In support of his application he showed that the parties and all the witnesses resided in the district of the registry. It was agreed that the trial of the action should take place in the district of the registry:—

Held, reversing Macnaghten J., that the plaintiff had shown no "good cause," within the meaning of the proviso, for the transfer of the action to the district registry.

APPEAL from Macnaghten J.

This was an appeal from an order of Macnaghten J. in Chambers, dismissing an appeal from a Master who had ordered that the action should be transferred from London to the Manchester District Registry. Both of the parties resided in the district of the registry, out of which the writ was issued. The defendant was accordingly obliged by Order XII., r. 4, to appear in the registry. Having done so, he served notice under Order XXXV., r. 14, that he desired the action to be removed to London. His solicitors were a London firm. When the action was so removed, the plaintiff applied, under the proviso to r. 14, for a transfer to the registry. An affidavit in support of the application was filed, stating that the parties and all the witnesses resided within the registry. It was agreed between the parties that the trial of the action should take place in the registry. The master granted the application, and Macnaghten J. dismissed an appeal by the defendant.

The defendant appealed. The appeal was heard on March 19, 1940.

John F. F. Platts Mills and *C. H. A. Lewes* for the appellant.

This matter arises under Order XXXV., r. 13, sub-r. 3, and r. 14. The defendant served his notice, as of right, under r. 14. He was not obliged to show any reason or cause. Then when an application is made under the proviso to r. 14 to transfer the action to a district registry, the Court has to consider whether any " good cause " has been shown for such a transfer, and it has then to consider whether it ought to exercise its discretion. No " good cause " was shown by the plaintiff in this case for a transfer of the action from London to the district registry. The question where the trial of the action should take place is dealt with by Order XXXVI., rr. 1, 10, but that question does not arise here. In *Walker* v. *Crabtree* (1) Field J. points out that he could only take away the defendant's right under rr. 13 and 14 on very clear grounds. In *Hammond Brothers and Champness, Ld.* v. *Jackson* (2), where the meaning of the words " good cause " in Order XII., r. 16, of the County Court Rules, 1903 and 1904, was dealt with, Bray J. (3) points out that it is always difficult to distinguish between what is " good "cause " and what is a matter for the discretion of the judge. In *Smith* v. *Bell* (4) Field J. ordered that the action should proceed in the district registry. Here the defendant has an unqualified right to have the action removed to London, and no " good cause " has been shown why his right should be set aside.

Milford Stevenson for the respondent. The learned judge was satisfied on the facts that the action ought to be transferred to the district registry, and the appellant has no cause of complaint. Everyone, except the appellant's solicitors, who has to do with the case, lives in the district. The whole matter is subject to r. 14, and the right of the defendant is subject to the proviso to that rule, which gives a wide discretion to the Court.

Cur. adv. vult.

1940. April 10. SIR WILFRID GREENE M.R. The judgment of the Court will be read by Goddard L.J.

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(1) [1883] W. N. 197.
(2) [1914] 1 K. B. 241.
(3) Ibid. p. 243.
(4) [1883] W. N. 196.

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Goddard L.J. This is an appeal from an order of Macnaghten J. in Chambers, dismissing an appeal from a Master who has ordered that the action should be transferred from London to the Manchester District Registry. The application to the Master was made under Order xxxv., r. 14; and the point of the appeal is as to the meaning to be attributed to the words "other good cause" in that rule. There is but little authority on the matter; and it does not appear ever before to have been considered in this Court, although the rule has been in existence at least since 1883. The parties to the action both live in the district of the Manchester District Registry, out of which the writ was issued. The defendant accordingly was obliged, by Order xii., r. 4, to appear in the registry; and, having appeared, he served notice under Order xxxv., r. 14, that he desired the action to be removed to London. The action was thus removed, as when once the notice is served the removal is automatic, and the plaintiff then applied under the proviso to the rule for a transfer to the Manchester District Registry. The Master made an order in those terms, though in strictness it should have been that the action do proceed in the district registry notwithstanding such notice.

On the hearing of the summons, the only evidence was an affidavit setting out in substance that the parties and all the witnesses resided within the district. It was in fact just the sort of affidavit that would be filed had it been desired to alter, under Order xxxvi., r. 1, the place of a trial which had already been fixed. There is no suggestion that any place other than Manchester should be the venue; and we were informed that, on Mr. Platts Mills for the defendant telling the learned judge that it was conceded that Manchester was the proper place for trial, he made the order now under appeal. If there was material upon which the learned judge could thus exercise his discretion, we should not consider that in this case it would be right to interfere: but the question is whether the fact that the parties and all the witnesses live within the district, without more, is good cause for depriving the defendant of his right to have

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the action proceed in London, although the trial must be in Manchester.

It is necessary to consider briefly the various orders dealing with proceedings in district registries. Under the combined effect of rr. 1 and 2 of Order V., a plaintiff can issue his writ out of any district registry that he pleases or out of the Central Office. Under Order XII., r. 4, if the defendant resides or carries on business within the district of the registry out of which the writ is issued, he must appear in that registry. If he does not, he can appear either in the registry or in the Central Office. If he elects to appear in the latter, the action proceeds in London: if he appears locally, r. 6 provides that the action shall proceed in the registry; but this is expressly subject to the power of removal conferred by Order XXXV., rr. 13 to 16. Rule 13 of that Order provides that an action may, subject to r. 14, be removed to London as of right: but it is clear from the words of the rule that it is only a defendant, or one of the defendants, who has this right of removal. Rule 14 provides for the removal by serving a notice; but it is also provided that if the Court is satisfied that a defendant who gives such a notice is merely a formal defendant, or has no substantial cause to interfere in the conduct of the action, or that there is other good cause for proceeding in the district registry, the Court may order the action to proceed in the registry notwithstanding such notice.

Mr. Platts Mills' first contention was that the Court should apply the rule of construction generally known as that of "ejusdem generis" to the rule, so that "other good cause" must be limited to considerations affecting the defendant's real interest in the suit. In support of this argument, he called attention to r. 16, which deals with the removal of matters not provided for by rr. 13 and 14, as for instance, originating summonses; and to r. 17, which provides for the converse case of removal from London to a district registry, neither of which contain any reference to the nature of the defendant's interest in the suit. He also referred to Order XII., r. 7, which provides that if a defendant appears in London the action shall proceed there; but with a proviso for transfer to the district registry, if a defendant who has appeared in London has no real interest in the suit. In this rule there is no mention of any other good cause. The combined effect of Order XII., r. 7, and Order XXXV., r. 17, is to give a plaintiff a right to apply for a transfer from London to a district registry on any ground; but he has to satisfy the Court that there is sufficient reason for doing so; he cannot do it as of right; and terms may be imposed upon him as a condition of transfer, except where the ground is the lack of substantial interest in the suit on the part of the defendant. But we do not think it would be right to put a limited construction on the words "other good cause." The rule of construction which is called "the ejusdem generis" construction, or sometimes the doctrine "Noscitur a sociis," is one which ought to be applied with great caution, because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the Legislature—per Rigby L.J. in *Smelting Company of Australia* v. *Inland Revenue Commissioners*. (1) We can conceive of many cases where it would, or might be, a real hardship on a poor plaintiff to have the case removed to the Central Office, so that all the interlocutory matters had to take place in London; and each case must be decided on its own particular facts. But it still remains to be considered whether facts which point, and point clearly, to the area of the district registry as the appropriate venue for trial are sufficient without more, to deprive the defendant of the privilege given to him by the rule of having the case removed to London for all purposes other than trial, a privilege which, it is to be noticed, is given as of right. If the proviso gives the Court authority to deprive the defendant of this right merely on what, when considering venue, is called the balance of convenience, it would seem that the privilege is more apparent than real. If a defendant who has an option chooses to appear in the district registry he would do so presumably because he wished the case to proceed there. He might, no doubt, change his mind; but the question is far more likely to arise where

(1) [1897] 1 Q. B. 175, 182.

he is bound to appear in the registry, and yet may wish the case to proceed in London. In the great majority of cases where a writ is issued from a district registry against a defendant living in that district, the case would naturally be what may be called a local case. If that fact is to be good cause for depriving him of the right to remove it to London, it is difficult to see what the object is of giving him this right. The rule does not require him to show a good ground for removal. We can well imagine the case of an action brought against a landowner who lives in the area of a district registry, and in respect of property situate also within that district. It may well be that his affairs have always been in the hands of London solicitors, whom he would desire to conduct the action. He could then exercise the right, although all the witnesses as well as the parties live in the district of the registry. The convenience of the parties and their witnesses, and the date at which a trial can be had, and such like matters, are all, by Order XXXVI., r. 10, to be taken into account when fixing the place of trial; but there are no such provisions in the rule that we are now considering.

In our opinion it is not sufficient to deprive a defendant of the right given to him by Order XXXV., rr. 13 and 14, merely to show facts which would be a good ground for fixing the trial within the district of the registry. Something more, as for instance that expense will be saved, or that it can be shown that some hardship will be caused to the plaintiff, is required. We do not say that questions of convenience are to be entirely ruled out; they might in a doubtful case turn the scale; but by themselves they are not enough. The only authority to be found on this matter is *Walker* v. *Crabtree*. (1) That was a case decided by Field J. during the period when he was sitting in Chambers for the purpose of settling the practice under the new rules. It appears to us that he was invited to apply the ejusdem generis rule and declined to do so; but at the same time he refused to deprive the defendant of his right of removal in spite of considerations not at all unlike those which arise in this case. He seems, therefore, to have

(1) [1883] W. N. 197.

arrived at the same conclusion as to the meaning of the rule as we have.

The result is that the appeal is allowed and the order of the judge and of the Master will be discharged; and the costs here and below will be the defendant's in any event.

Appeal allowed.

Solicitors for the appellant: *R. I. Lewis & Co.*

Solicitors for the respondent: *Sharpe, Pritchard & Co., for Pickstone & King, Radcliffe, Lancashire.*

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Highway—Public footpath—Diversion—Final certificate of justices that substituted highway completed—Substituted highway not then completed—Application for order of certiorari to quash certificate—Delay in making application—Refusal of application—Discretion—Highways Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 91.

When on an application to divert a public highway under the Highways Act, 1835, the justices wrongly made their final certificate under the proviso to s. 91 that the substituted footpath had been completed and put in good condition and repair, an aggrieved party was not entitled to an order of certiorari to quash the certificate ex debito justitiæ. The Court had a discretion which it could and did exercise to refuse the application on the ground that there had been undue delay in bringing the proceedings.

Decision of the Divisional Court (Lord Hewart C.J., Charles and Humphreys JJ.) affirmed.

Passage from the judgment of Blackburn J. in *Reg.* v. *Surrey Justices* (1870) L. R. 5 Q. B. 466, 473, explained.

Appeal from the Divisional Court.

The facts, which are more fully stated in the judgment of Sir Wilfrid Greene M.R., are briefly as follows.

A company called Broadbridge Estates (Besses), Ld. (hereinafter called " the builders "), were the owners of land in the borough of Stafford over which a public footpath existed. Being desirous of developing this land as a building estate they gave notice in writing on March 20, 1937, to the mayor, aldermen and burgesses of the borough of Stafford (hereinafter called " the corporation ") of their desire to divert the public footpath to the extent of about 387 yards, so that apart from two short pieces of path 4 feet wide the footpath might run in a zig-zag course across the estate along certain roads they were proposing to make, the roads varying between 30 and 36 feet in width.

On April 27, 1937, the council to the borough resolved that it was expedient that the footpath should be diverted and authorized the borough surveyor to apply to two justices of the borough to view the footpath; and on August 30, 1937, two justices of the borough gave their certificate that the footpath might be diverted in the manner proposed so as to make the same more commodious to the public. On October 5, 1937, the corporation applied for and obtained an order of the court of quarter sessions directing that the new footpath should be set out and appropriated for use as a public footpath in lieu of the existing footpath which was then to be turned, diverted and stopped up.

On January 3, 1938, the justices made a further certificate that the new footpath had been set out and appropriated as ordered and was then completed and put into good condition and repair. That certificate was duly enrolled at quarter sessions on April 5, 1938. On April 18, 1939, the corporation, pursuant to the leave of the Court obtained on March 31, 1939, issued a notice of motion for an order of certiorari to remove into the King's Bench Division the certificate of the two justices dated January 3, 1938, for the purpose of being quashed on the ground that the new footpath had not then been completed and put into a good condition, seeing that a great part of its width had not been laid out and that in giving the certificate the justices had exceeded their jurisdiction.

At the time of the second view by the justices on January 3, 1938, the new footpath had not been made up to the proper width of 30 or 36 feet, but a strip 4 feet wide had been coated with ashes to form a temporary footpath. There was evidence that the borough surveyor to the corporation was then aware of the condition of the substituted footpath, but that the town clerk only became aware of it after he received a letter dated November 26, 1938, contending on behalf of the builders that the corporation must make up and complete the substituted highway.

The Divisional Court (Lord Hewart C.J., Charles and Humphreys JJ.) dismissed the motion, holding that the Court ought not in the exercise of its discretion to grant an order of certiorari in view not only of the long lapse of time between the date of the certificate and the date of the application in

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this case, but also of the fact that during that time a number of houses had been built upon parts of the site of the old footpath while the corporation stood by.

The corporation appealed. The appeal was heard on April 9, 10, 1940.

A substantial part of the arguments were on the question whether the appellants were parties aggrieved. It was contended that they were on the ground that, as a result of the certificate of January 3, 1938, being granted before the substituted footpath was completed and made up, an increased pecuniary liability was cast upon the appellants by reason of their obligation to maintain the substituted footpath as being a highway repairable by the inhabitants at large. No decision was come to on this point and this part of the argument is therefore omitted.

R. M. Montgomery K.C. and *G. D. Squibb* for the appellants. The certificate of January 3, 1938, which was made under the proviso to s. 91 of the Highways Act, 1835, should not have been made, as the entire carriageway and footpath had not been put into good repair. The reason for allowing the diversion was that the substituted footpath would be more commodious by reason of the width of the new roads along which it was to go. The justices had no power to order the stopping of the old track till the whole surface of the new highway had been completed as a footpath. It was the whole new way that was the substituted highway: *Kingston-upon-Thames Corporation* v. *Baverstock* (1); *Stockwell* v. *Southgate Corporation.* (2) Further, this is a case in which a writ of certiorari will lie: *Sarjeant* v. *Dale* (3); *Rex* v. *Woodhouse* (4), where the dissenting judgment of Fletcher Moulton L.J. is important, as the decision was reversed in the House of Lords sub nom. *Leeds Corporation* v. *Ryder* (5); *Rex* v. *Electricity Commissioners* (6); *Estate and Trust Agencies* (1927), *Ld.* v. *Singapore Improvement Trust* (7); *Rex* v. *Hendon Rural*

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(1) (1909) 100 L. T. 935.
(2) (1936) 155 L. T. 437, 439.
(3) (1877) 2 Q. B. D. 558, 566.
(4) [1906] 2 K. B. 501, 534, 535.
(5) [1907] A. C. 420.
(6) [1924] 1 K. B. 171, 195, 205.
(7) [1937] A. C. 898, 914, 915.

District Council. Ex parte Morley. (1) Again the order applied for should be granted ex debito justitiæ to the appellants seeing that they are aggrieved parties: *Forster* v. *Forster and Berridge* (2); *Reg.* v. *Surrey Justices.* (3) If, however, the Court has a discretion in the matter, as the Divisional Court held, there has been no delay and standing by sufficient to disentitle the appellants to an order. It is true that the interval between the date of the certificate and the date of the application in this case was considerable—over fourteen months. But during most of the time the appellants had no knowledge of the condition of the new highway and only heard of it in November, 1938. While the borough council are bound by anything done by their servant within the scope of his authority, the borough surveyor's knowledge of the facts cannot be imputed to them, since he was under no duty to report these facts to them. It would be different if the town clerk, knowing the facts and the law, had failed contrary to his duty to communicate those facts to the council, that knowledge would still be imputed to the council.

Valentine Holmes and Milmo for the builders. The conduct of the appellants has precluded them from obtaining a writ of certiorari by reason of their delay. In such a case as this the grant of the writ is discretionary: Halsbury's Laws of England, 2nd ed., vol. ix., pp. 876–9, also pp. 1479–81; *Rex* v. *Yorkshire East Riding Justices* (4); *Rex* v. *Glamorganshire Appeal Tribunal. Ex parte Fricker* (5); *Rex* v. *Williams* (6); *Whelan* v. *Rex.* (7)

Even if the appellants are parties aggrieved, the Court still has a discretion to refuse an order of certiorari and should do so on the ground that the appellants have disentitled themselves by their conduct to this relief. First, they have been guilty of delay. It is suggested that the true position was only found out in November, 1938; but even so the delay to March 31, 1939, would be excessive, having regard to the date when the certificate was granted. But here the true facts were known to the borough surveyor at the date of the certificate and it is fallacious to argue that the borough surveyor was under no duty to report it to the borough council. This is not a question of duty but of knowledge, and the knowledge of their surveyor was the knowledge of the council. In fact, therefore, there was a delay of fourteen to fifteen months. But the matter does not stop there; the borough council stood by while houses were erected on parts of the old public footpath and sold to entirely innocent persons. That is a second strong ground why the appellants should not be given relief, seeing that it would involve the old footpath having never been stopped up. If the certificate were quashed the owners of these houses could be compelled to pull them down as being obstructions to a public highway.

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(1) [1933] 2 K. B. 696, 702, 704.

(2) (1863) 4 B. & S. 187, 199.

(3) (1870) L. R. 5 Q. B. 466, 472.

(4) (1834) 3 Nev. & Man. (K. B.) 93, 95.

(5) [1917] W. N. 27; 115 L. T. 930.

(6) [1914] 1 K. B. 608.

(7) [1921] 2 I. R. 310.

If that would not be the effect of an order quashing the certificate, then the quashing of the certificate would have no effect at all, and no Court would order a writ of certiorari to issue that could effect nothing. The Divisional Court was therefore amply justified in refusing to make the order asked for.

W. E. P. Done (for *J. R. Willis* on war service) for the justices.

R. M. Montgomery K.C. in reply. It is not true that the quashing of the certificate would be without effect, for it would relieve the appellants from the liability of making up the road. The authorities cited do not show that the Court has a discretion as to granting the order asked for when the application is made by a person aggrieved. In any case delay cannot be a ground for refusing such an application unless the delay is one for which the applicant is responsible, having regard to the facts within his knowledge. Even if the borough surveyor knew of the condition of the new roads in January, 1938, he did not know the certificate had been granted.

SIR WILFRID GREENE M.R. The present dispute arises out of certain proceedings taken for the purpose of diverting a

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highway in the borough of Stafford. The highway in question was a public footpath which crossed some land belonging to the respondents, Broadbridge Estates (Besses), Ld.—the exact nature of their interest is not material, whether they were freeholders or only building lessees—and they were engaged in developing the land and building houses upon it. The existence of this footpath was an impediment to their plans and they accordingly desired to have it diverted. The nature of the diversion which they proposed involved the suppression of the public footpath and the substitution for it of certain roadways which were shown on a plan. The roadways shown on the plan were of the ordinary width of carriageways, with footpaths, in such surroundings, and the effect of the diversion would be that the public, instead of using the old footpath, would use a footpath in the nature of a zig-zag along the contemplated roads. The roadways shown upon the plan went roughly north and south, east and west, north and south, and west, and, with a very small piece of footway as well as those roadways, were to constitute the substituted footway. With that object in mind, the Estates Company, on March 20, 1937, applied to the corporation of the borough of Stafford, who are the highway authority, to take the necessary legal steps on their behalf to effect the diversion of the old footpath. A resolution of the council was passed on April 2 acceding to that request, and instructing the borough surveyor to set the necessary machinery before the justices in motion. He did so and on May 20 two of the justices viewed the site and on August 30 they issued a certificate. That certificate, after reciting the request by the borough surveyor, the conclusion of the justices that the footpath might be diverted as proposed and the affixing of the necessary notices, went on to certify that they did on May 20 "view the said public footpath so "proposed to be diverted and turned as aforesaid and the line "and site of the said new footpath so proposed to be sub-"stituted for the same And did upon such view find and we "do hereby certify that for the reasons hereinafter stated the "said public footpath may be diverted and turned in manner "aforesaid so as to make the same more convenient and "commodious to the public by the substitution for the same of the "said proposed new footpath." Then they certified that the new footpath would be more commodious for the reasons stated, the first of which was that the width would be increased to 30 or 36 feet over the greater part of the way, and the second, that it would provide a more suitable entrance from and to a particular street.

That certificate was followed by an order of quarter sessions, which is not in evidence but a copy of which was furnished to us and to which reference must be made for purposes of completeness. It is dated October 5, 1937. It is made upon motion by counsel for the Stafford Borough Council, and it recites the certificate and the enrolment of the certificate. It then proceeds to order that the old footpath be stopped up, diverted and turned by means of a new public footpath, which is then described by reference to the plan. The procedure which has been followed down to that point was in accordance with the relevant sections of the Highways Act, 1835, which I need not read, but it is necessary to refer now to s. 91 in order to see what was the state of affairs at the point when that order of quarter sessions of October 5 was made. Sect. 91 provides that in the absence of appeal, the justices of quarter sessions "shall make an order to divert and turn and stop up such high-"way . . . . by such ways and means . . . . as in this Act is "mentioned in regard to highways to be widened; and the "proceedings thereupon shall be binding and conclusive on all "persons whomsoever; and the new highway so to be appro-"priated and set out shall be and for ever after continue a "public highway to all intents and purposes whatsoever." If the matter had stood there, the effect of the order of October 5 would apparently have been to stop up the old footpath and to substitute for it as a public highway the way shown on the plan and thereon coloured blue, being the proposed roads and footpaths which were intended to be constructed upon this land. But the section is subject to the proviso: "But no old highway" —except in a case which is immaterial—"shall be stopped "until such new highway shall be completed and put into good "condition and repair, and so certified by two justices of the "peace upon view thereof." Then there is provision for the enrolment amongst the records of quarter sessions of the certificate so made.

Accordingly, the position at this point of time was that the old highway remained open to the public and would remain open to the public until the new highway was completed and put into good condition and repair and it was so certified by two justices of the peace upon a view. The solicitors for the building company on December 18, 1937, wrote to the town clerk as follows: "I have now "ascertained that the proposed new footpath has been "constructed, and I shall be glad, therefore, if you will "make arrangements for the justices to view the same as "soon as possible." We are told that on receipt of that letter the town clerk communicated with the clerk to quarter sessions by telephone and read that letter to him. No communication, we are told, was made to the borough surveyor in connection with that letter or the communication made by the town clerk to the clerk to quarter sessions.

The next thing that happened was that the two justices proceeded to take a view as provided by s. 91 of the Highways Act. They did that on January 3, 1938, and they gave their certificate in writing on that day. The certificate states that the justices had viewed and surveyed the new highway, which they then described by reference to the plan and identified as the new highway referred to in the order of October 5, 1937. Then they certified that: "The said new "highway being a public footpath has been so set out and "appropriated as ordered and is now completed and put "into condition and repair."

Now the state of the ground at the date when that certificate was given was, putting it shortly, that the new highway in certain parts had been completed, that is to say that the parts of the road along which it ran had been made up, but for a considerable stretch of road as shown on the plan, the road had not been made up; all that had been done was that a four foot track of ashes to form a temporary footpath had been put down. That describes with sufficient accuracy for the purpose of this case the sort of state in which a substantial length of this new highway was at the date of the certificate.

In order that the conditions necessary for the granting of the certificate could exist, it was quite clearly necessary that the whole of the substituted highway should be completed and put into good condition and repair. Unless that state of affairs existed and was certified to exist, the old highway would remain open. It is quite clear that with regard to that stretch, that state of affairs did not exist at the date of the certificate. It appears to have been thought by the justices and by the building company that the only thing necessary was to put down a footpath of the ordinary width of a footpath. That was a misapprehension, because it was the whole of the new highway which was being substituted for the old footpath, and the effect of the substitution was to give a public right of way on foot over the whole of the thirty or thirty-six feet, as the case might be; and it was that substituted highway which had to be completed and put into good condition and repair as a footway before the justices could grant a certificate and before the old highway could be stopped. The conditions of the section were not fulfilled by merely laying down a footpath of the ordinary width. However, the certificate was given and it is that certificate which the present appellants, the mayor, aldermen and burgesses of the borough of Stafford, are seeking by these proceedings to have quashed.

The relief that is asked for is for an order of certiorari to remove the certificate of January 3, 1938, into the King's Bench Division for the purpose of such certificate being quashed. It is said that it was a condition precedent to the power of the justices to grant a certificate that the new substituted highway should be in the physical condition indicated in s. 91, and that the certificate having been granted when that state of affairs did not exist, it was necessarily bad.

Now the effect of non-compliance with the provision at the end of s. 91 would be that the old highway would remain unstopped. The result, therefore, is that if the conditions have not been fulfilled, that old highway remains open to the public. It is perhaps worth noticing that the old highway only becomes stopped when not merely has the new highway been completed and put into good condition and repair, but when it has been so certified by the justices. The result of the substitution of the new highway for the old one is to impose upon the local authority the obligation to maintain it and keep it in repair, because the old footpath in question was an old footpath repairable by the inhabitants and the substituted way is also repairable by the inhabitants, that is to say, by the borough council as the highway authority.

The matter came before the Divisional Court, and that Court declined to make the order upon the ground that the conduct of the applicants and the delay which had taken place were such that the Court ought not, in its discretion, to give this form of relief. The learned judges of the Divisional Court in their judgments dealt with another matter—namely, the question whether this certificate was one which could be dealt with by certiorari. The Lord Chief Justice and Charles J. did not decide that question, and expressed some doubts about it. Humphreys J., on the other hand, was quite clearly of opinion that this certificate could be quashed by means of an order of certiorari. We have not required argument upon that point, but it must not be taken from that that we entertain the same doubts as were entertained by the majority of the Divisional Court. All that it is right to say upon the matter is that, as it has not been argued, it is not proper to express an opinion upon it.

Mr. Montgomery, on behalf of the appellants, argued that the remedy of certiorari in a case where an applicant is a person aggrieved is not a matter of discretion at all. He said that if the particular subject-matter is amenable to proceedings by way of certiorari, and if the absence of jurisdiction is once established, then if the applicant is a person aggrieved, he is entitled ex debito justitiæ to his order, and no question of discretion comes into the matter at all. The particular interest which in the present case he said made the borough council persons aggrieved lay in the circumstances that if the new highway is substituted for the old one, the borough council are under the obligation to keep it in repair, and by reason of what had happened, they have suffered this disadvantage, that they are taking over, with the obligation to repair, a highway which has never been completed and put into proper condition. That, they say, will impose upon them a greater pecuniary liability, and therefore singles them out as persons suffering by this excess of jurisdiction on the part of the justices a disadvantage over and above what would be suffered by the ordinary member of the public. That view of the matter is not accepted by Mr. Valentine Holmes. I do not find it necessary to take up time discussing the question whether the borough council are or are not parties aggrieved, in view of those facts. I am prepared to assumed that they are such parties. On that basis, says Mr. Montgomery, his clients are entitled to the order as of right.

Now, in my opinion, the order for the issue of the writ of certiorari is, except in cases where it goes as of course, strictly in all cases a matter of discretion. It is perfectly true to say that if no special circumstances exist, and if all that appears is a clear excess of jurisdiction, then a person aggrieved by that is entitled ex debito justitiæ to his order. That merely means this, in my judgment, that the Court in such circumstances will exercise its discretion by granting the relief. In all discretionary remedies it is well known and settled that in certain circumstances—I will not say in all of them, but in a great many of them—the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way, and if a judge at a trial refuses to do so, then the Court of Appeal will set the matter right. But when once it is established that in deciding whether or not a particular remedy shall be granted the Court is entitled to inquire into the conduct of the applicant, and the circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought, the case must in my judgment be one of discretion.

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In the present case the circumstances are indeed remarkable. Before examining them, I should perhaps make two short references to the authorities which have been cited before us in support of my statement of what I conceive to be the law. In the first place, in *Reg.* v. *Sheward* (1), a decision of this Court, Bramwell L.J. stated in terms: "The "granting of a certiorari is discretionary." In *Reg.* v. *Surrey Justices* (2), a decision of the Divisional Court of the Court of Queen's Bench, Blackburn J., delivering the judgment of the Court, said (3): "Where the party grieved has by his "conduct precluded himself from taking an objection, the "Court will not permit him to make it as in *Reg.* v. *South* "*Holland Drainage Committee.*" (4) It is true that he goes on to say: "In other cases where the application is by the "party grieved, so as to answer the same purpose as a writ "of error, we think that it ought to be treated, like a writ of "error, as ex debito justitiæ; but where the applicant is "not a party grieved (who substantially brings error to redress "his private wrong), but comes forward as one of the general "public having no particular interest in the matter, the Court "has a discretion, and if it thinks that no good would be "done to the public by quashing the order, it is not bound "to grant it at the instance of such a person." Then towards the end of the judgment, he says: "Therefore we think that, "in exercising our discretion, we must see whether the present "applicant is in the condition of a person grieved, applying "for the certiorari to remove an order made without juris"diction which affects his interests; and we think he is." I do not read the observations in that judgment with reference to the right of the party aggrieved ex debito justitiæ as being in any way inconsistent with what I have stated. It merely means that unless there is something in the circumstances of the case which make it right to refuse the relief sought, the Court will grant it, and that that is the way in which the Court will and must on ordinary principles exercise its discretion.

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(1) (1880) 9 Q. B. D. 741, 742.

(2) L. R. 5 Q. B. 466.

(3) L. R. 5 Q. B. 466, 473.

(4) (1838) 8 Ad. & E. 429.

Now it appears from that case, and the case of the *South Holland Drainage Committee* (1), that the conduct of the applicant is something that may be looked at, and the fact that delay also is a relevant consideration appears in the case of *Reg.* v. *Sheward* (2), to which I have already referred, and also, I think, in the case of *Rex* v. *Glamorganshire Appeal Tribunal. Ex parte Fricker.* (3)

Bearing those principles in mind, it becomes necessary to examine a little further the history of this case. The certificate was granted as long ago as January 3, 1938. It was enrolled on April 5, 1938, and, of course, all this was done at the instance of the council themselves, who were the persons who were conducting the proceedings, at the request of the builders. It is not disputed that on January 3, and before and after that time, the physical condition of the part of the road in question was well known to the borough surveyor; in fact, it is impossible to suppose the contrary. He was the person who had set the machinery in motion at the instance of his council, and it was without any doubt his business, as the borough surveyor, to be acquainted with any highway matters that affect his council; and as I say, it is not disputed that he knew the state of affairs on January 3 and before and after that date. Knowing that, if he had appreciated the true meaning of s. 91 of the Highways Act, he would no doubt have realized that the matter was not yet ripe for a certificate by the justices. But, apparently, he did not realize that that was the legal position. The town clerk, on the other hand, who no doubt would have appreciated the legal position, did not, we are told, know the facts. He assumed apparently that the new substituted way had been completed and put into good condition and repair. Nevertheless, it must, I think, clearly be taken that the council through their appropriate officer, namely, the borough surveyor, knew the relevant facts with regard to the condition of this road, and that knowledge must be imputed to the council through the whole of the subsequent history. The fact that that knowledge

(1) 8 Ad. & E. 429.

(2) 9 Q. B. D. 741.

(3) [1917] W. N. 27; 115 L. T. 930, 932.

did not find its way to another officer of the council, whose duty it was to advise the council on matters of law, appears to me to be irrelevant. It merely means that by an unfortunate accident, for which nobody could fairly in the circumstances be blamed, the two pieces of knowledge, the fact and the law, did not come into the same mind. I cannot see how the council can assert that the knowledge of their surveyor with regard to this physical state of affairs was not knowledge which must be imputed to them.

Now it appears that since January 3, 1938, the builders have proceeded with their operations and have built houses across the site of the old footpath, and that those houses were built with the knowledge and consent of the council. It was not until November 26, 1938, or an interview a few days before that date, that the council appear to have become alive to the matter, because on that date a letter was written by the then solicitors to the builders to the town clerk, referring to a contention put forward at the interview by the surveyor that the liability for making up and completing the diverted public footpath should fall on the builders and not on the local authority. It was contended on the other side that the liability lay on the council. Then it was realized that there were difficulties in maintaining the council's proposition so long as the certificate of the justices stood, and in the result the present application was made on, I think, March 31, 1939, that is to say, nearly five months later than the date in November, 1938, when the point was raised. Quite apart from what had happened before that, it seems to me that that delay of five months before applying to the Court is, in the circumstances, quite unwarrantable. I cannot see what justification there can be and what special privilege a local authority has got to take longer over urgent operations than anybody else. If, in November, the position was realized by the competent officer of the council, a position which was realized after a considerable period had already elapsed and operations were going on, it was at that time that quick and speedy application for relief was obviously called for, instead of which five months' delay took place before the

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application was launched. I should have considered myself that that circumstance alone was one which ought to prevent the Court from granting any relief on the facts of the case; but it is not necessary to rely on that alone. The delay, looking at the delay by itself, must in my judgment be carried back, not to November, 1938, but to January of that year, when the full facts as at the date of the granting of the certificate were known to the council through their surveyor. That delay is a very long one, but in the interval the council had, by their conduct, encouraged and permitted the builders to do something which, if the old highway had never been stopped up, was entirely illegal. So long as the old highway remains open, the builders have no right whatsoever to build houses across it, and the effect of taking any step which will open up that highway again will be to put the builders in the position of having illegally obstructed the old footpath by building houses upon it, which incidentally we are told they have sold to purchasers. The position would be really a ridiculous one, if this Court, at this stage, and in the light of what has happened, were to take a course which would result in reopening that old footpath as a public highway, with all the consequences which flow from its status as a public highway. It seems to me that this state of affairs having been brought about with the full knowledge of the council, and indeed with their actual consent, so far as regards the building of the houses, it is quite impossible for the Court to grant relief which will have the effect of quashing that certificate. The result, therefore, in my opinion, is that the Court, having regard to all the circumstances of this case, and in particular the knowledge and conduct of the council and the time which has elapsed, ought not in its discretion to grant the relief asked for.

In my opinion the Divisional Court was perfectly right in the view they took on this branch of the matter, and the appeal must be dismissed with costs.

SCOTT L.J. I am in complete agreement with all that my Lord has said.

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Singleton J. I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for T. Broughton Nowell, Town Clerk, Stafford; Pritchard, Englefield & Co., for Thomas Jones & Co., Manchester; Sharpe, Pritchard & Co., for W. W. M. Morgan, Clerk to the Justices, Staffs.*

H. C. G.

THE KING *v.* COWELL.

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April 8.

Criminal law—Evidence—Objection to admissibility of statement of prisoner as not being voluntary—Right of prisoner to give evidence thereon.

On the hearing at a trial of an objection to the admissibility in evidence of a statement by the prisoner on the ground that it was not a voluntary statement, the prisoner himself is entitled to give evidence, if the justice of the case makes it desirable.

Rex v. *Baldwin* (1931) 23 Cr. App. Rep. 62 disapproved.

APPEAL against conviction.

The appellant, William Charles Cowell, was convicted at the Sussex Assizes of murder. The principal evidence for the Crown was a written statement made by the appellant confessing the crime. At the trial objection was taken to the admissibility of this statement on the ground that it was not a voluntary statement, but had been induced by the promise of a police officer that when the appellant had finished his statement he would be at liberty to go home. On the objection being taken, and the jury having left the court, Humphreys J. heard the evidence on the issue of admissibility. Counsel for the defence, on the authority of *Rex* v. *Baldwin* (1), expressed doubt whether he was entitled to call the prisoner on the issue. Humphreys J. ruled that he was, and the appellant gave evidence accordingly. In summing-up to the jury Humphreys J. left it to them to say whether or not the statement was voluntary.

The appellant was convicted and sentenced to death.

Eric Neve K.C. and *Alban Gordon* (for *C. J. T. Pensotti*, on war service) for the appellant.

John Flowers K.C. and *G. A. Thesiger* for the Crown.

There was no argument on the point on which this case is reported.

The judgment of the Court (HAWKE, CHARLES and HILBERY JJ.) was delivered by HAWKE J. It must

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(1) (1931) 23 Cr. App. R. 62.

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have become quite obvious at a very early stage of this case that the appellant was convicted because his confession was so clear, and was, one may add, corroborated in the sense that in the course of it he said things which nobody but the murderer could have known. Mr. Neve took objection to the admissibility of this statement, and thereupon Humphreys J. asked the jury to retire while he heard discussion whether the statement could be admitted or not. During the discussion the point arose whether the appellant himself could be called as a witness on the question whether or not the statement was admissible. Mr. Neve himself, bowing to what he understood to be the law laid down in *Rex* v. *Baldwin* (1), doubted whether he could call the appellant. Humphreys J. thought that he could, and, indeed, it is only fair to the learned Judge to say that he encouraged Mr. Neve to do so. Whatever the case of *Rex* v. *Baldwin* (1) may have decided, this Court is of opinion that in such circumstances as those of this case, it is proper to allow the prisoner himself to be called as a witness if the justice of the case makes it desirable that this should be done, and Humphreys J. took this view. He added that it would be permissible for counsel to go into all the circumstances before the jury with a view to determining the value of the statement in fact. The judge, after hearing the evidence, including that of the appellant, decided that the statement was admissible.

I may say that my brother Hilbery and I myself have on previous occasions ruled that it was proper to permit the prisoner to be called in such circumstances. We can find nothing wrong with this trial, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Director of Public Prosecutions.*

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(1) 23 Cr. App. R. 62.

W. L. L. B.

BARKING RATING AUTHORITY *v.* CENTRAL ELECTRICITY BOARD.

1940
Jan. 14, 15;
April 2.

Rates—Electricity supply undertaking—Valuation of hereditaments—Profits basis—Special circumstances—Question of fact—Matters occurring after making of rate inadmissible in evidence.

Whether in a rating assessment the special circumstances of the case make it necessary for the authority to exclude the general rule as to the "profits basis" laid down in *Kingston Union* v. *Metropolitan Water Board* [1926] A. C. 331, is a question of fact for the assessment committee itself or for quarter sessions. The High Court will not interfere with their decision, unless they have misdirected themselves by refusing to apply the formula laid down in the above case, without regard to the question whether there were special circumstances requiring another method of assessment.

The assessment committee or quarter sessions in assessing a company's premises may have regard to matters affecting the valuation between the closing of the company's accounts and the date of the making of the rate, but they should not consider matters which have occurred after the date of the making of the rate.

Reg. v. *London, Brighton and South Coast Ry. Co.* (1851) 15 Q. B. 313 explained and applied.

CASE stated by Essex Quarter Sessions under the Rating and Valuation Act, 1925, s. 31, sub-s. 5.

The appellants, the rating authority for the borough of Barking, appealed to quarter sessions against a decision of the Assessment Committee for the Southern Essex Area as to the value of the hereditaments in the area occupied by the respondents, the Central Electricity Board.

The respondents were established under the Electricity (Supply) Act, 1926, s. 1, and had constructed or acquired a net-work of transmission lines and other premises called "the grid" which they occupied for transforming and transmitting electricity under their statutory powers. Their premises in the appellants' area consisted of an electricity sub-station and transmission towers and lines. On April 1, 1934, this hereditament was assessed in the Barking valuation list at a rateable value of 1244*l.*, and on May 26, 1934, the respondents objected to this assessment as being excessive and unfair. The appellants proposed to amend this proposal by increasing the assessment, and to this the respondents objected. On March 15, 1937, the Southern Essex Assessment Committee determined the proposals and amended the valuation list by increasing the assessment to 2100*l.*

The respondents did not generate electricity, although they had power to do so. They bought all the electricity generated at certain selected stations which were operated under their control. The energy purchased by the respondents was sold in bulk to other authorized undertakers who in turn sold to other undertakers or to consumers. The owner of a selected station, who might also be an authorized undertaker, sold his output of energy to the respondents and bought back as much as he required for his own distribution at a statutory price. So much of the energy produced at that station as was repurchased did not pass on the grid. The selected stations were so linked up by the grid that the spare generating plant could be kept at a minimum for the county as a whole. For the purpose of the undertaking the county was divided into nine areas, of which the hereditament here was in the South-Eastern area. The tariff charged by the respondents (s. 11 of the Electricity (Supply) Act, 1926) had to be fixed so that over a term of years the receipts of income account would be sufficient to cover the expenditure. The term of years approved by the Commissioners was generally ten years. The respondents could not require a supply of electricity to be purchased from them by any authorized undertaker other than the owner of a selected station, except under ss. 10 and 14 of the Act.

At the hearing before the assessment committee the respondents contended that on an application of the profits basis the rateable value of the hereditament was nil, but they offered to accept an assessment of 2100*l.* based on a valuation of the transmission lines, according to the recommendation of the Central Valuation Committee.

The assessment of the undertaking for the year April 1, 1934, to April 1, 1935, on a profits basis with reference to the respondents' accounts for 1933 or 1934 would be nil.

At the hearing of the appeal to quarter sessions on June 15, 1938, that court ruled that estimates other than those for 1933 and 1934 in respect of the areas actually engaged in general trading in those years were inadmissible. ("General "trading" existed when a tariff under s. 11 of the Act fixed by the respondents and approved by the Commissioners had come into operation in any area.)

The appellants contended that there was no justification in law for limiting the profits basis to the accounts for the year preceding the date of assessment. They also contended that there were special circumstances existing at April 1, 1934, which made the profits basis in law inapplicable. The alleged circumstances, seven in number, are fully set out below in the judgment of the Court.

The respondents contended that the undertakings should be assessed on the profits basis; that there were no special circumstances rendering that basis inapplicable; that the hypothetical tenant from year to year was not a tenant for a term certain, and, in particular, not a tenant for a term of ten years; that the evidence of the appellants as to possible profits over a ten years period was irrelevant to the net annual value of the undertaking at the time when no profits were being earned; that the imposition of such a rent and rates would have prevented the respondents from fixing any tariff which would have enabled them to carry out the objects of the Act and no hypothetical tenant could reasonably be expected to pay such a rent; and that in the application of the profits basis the net receipts must be ascertained with reference to the accounts of the last available accounting period before the beginning of the hypothetical tenancy.

The court of quarter sessions decided that the correct basis of assessment was the profits basis, and that on that basis the rateable value of the hereditament was nil. At the request of the appellants they stated this case for the opinion of the High Court: (1.) whether quarter sessions were right in law in deciding that there were no special circumstances which made the profit basis inapplicable as a mode of assessment; and (2.) whether the evidence relating to the estimates and accounts of the respondents after 1934 was rightly excluded.

S. G. Turner K.C. (for *Trustram Eve K.C.* on war service) and *Scott Henderson* for the appellants.

Craig Henderson K.C. and *Erskine Simes* for the respondents.

[The following cases were cited in the course of argument: *Reg.* v. *Grand Junction Ry. Co.* (1); *Reg.* v. *London School Board* (2); *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (3); *Great Western and Metropolitan Rys.* v. *Kensington Assessment Committee* (4); *Metropolitan Water Board* v. *Chertsey Union Assessment Committee* (5); *Kingston Union* v. *Metropolitan Water Board* (6); *St. James' and Pall Mall Electric Light Co.* v. *City of Westminster Assessment Committee* (7); *Railway Assessment Authority* v. *Southern Ry. Co.* (8); *Metropolitan Electric Supply Co.* v. *Buckingham County Valuation Committee.* (9)]

Cur. adv. vult.

1940. April 2. The judgment of the Court (Lord HEWART C.J., HUMPHREYS and HILBERY JJ.) was read by HILBERY J. as follows: This appeal by way of case stated raises two questions. To adopt the words of counsel for the appellants, the substantial question is whether the court of quarter sessions was right in law in holding itself bound to arrive at the rateable value of the hereditaments in question on what is known and recognized as the "profits basis." It was laid down by the House of Lords in *Kingston Union* v. *Metropolitan Water Board* (10), that, in the case of a water company or other body supplying water in a number of different parishes and possessed in those parishes of reservoirs, mains and other property necessary for the purposes of the undertaking, the rateable value of the hereditaments of the undertaking in any particular parish should be ascertained

(1) (1844) 4 Q. B. 18.
(2) (1886) 17 Q. B. D. 738.
(3) [1901] A. C. 175.
(4) [1916] 1 A. C. 23.
(5) [1916] 1 A. C. 337.
(6) [1926] A. C. 331.
(7) [1934] A. C. 33.
(8) [1936] A. C. 266.
(9) [1939] 1 K. B. 601.
(10) [1926] A. C. 331, 345.

on the profits basis. To that rule of general application where such undertakings were concerned Lord Cave added this proviso: "I do not mean that in no case can another method "be adopted by a rating authority in assessing waterworks "for rating purposes; but in order to justify that course it "would be necessary that the authority should be satisfied "that there are special circumstances in the case sufficient to "make it necessary for them to exclude the recognised formula "of assessment and to resort to some other principle." "Necessary" in that context, it is not disputed, means necessary in order to assess the rateable value of the hereditaments in question in any particular case. It was conceded by counsel for the appellants that that decision would be applicable to the respondents' undertaking and that the profits basis would be the right method to apply were it not that the facts disclosed, as the appellants contended, special circumstances sufficient to make it necessary to exclude this recognized formula of assessment.

Before dealing with what were said to be the special circumstances making it necessary to exclude the profits basis, it is worthy of note that neither the assessment committee nor the court of quarter sessions felt any difficulty in applying the recognized method to the facts of this case. It must be essentially a matter for the body which has the duty of making the assessment to say whether it finds in the facts circumstances which make it necessary to depart from the recognized formula and to employ another.

A question of law for this Court might well be said to arise if the assessment committee misdirected itself by refusing to apply the recognized formula without regard to the question whether or not there were special circumstances compelling resort to another method, since it is now the law that an undertaking of the nature dealt with in the *Kingston Union* case (1) must be rated in all the parishes where it has rateable hereditaments according to this recognized formula. But if, as here, the assessment committee and quarter sessions, rightly applying the law, decide the rateable assessment by

(1) [1926] A. C. 331, 341.

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the recognized formula, there is no law which decides what shall or shall not be special circumstances making it necessary for them to adopt another method. If those tribunals examine the facts and decide the question whether or not the facts compel them to depart from the formula which the law says they must employ, their decision on that question is one of fact and not of law. That the *Kingston* case (1) went up through all the Courts was due to the fact that the decision of the justices had been given as a decision of law. In that case it was pointed out by Lord Cave that it was evident that the justices were of opinion that in law the profits basis was inapplicable to such an undertaking as was there in question, since it was carried on in performance of a statutory duty and not for profit, and, says Lord Cave, " it would have been "difficult for them to indicate more clearly that the question "which they intended to submit was one of rating law and not "of fact." That, of course, is wholly different from a case like the present. Here the case as stated shows that the justices did what the law required them to do, that is to say, they took the profits basis formula as prima facie applicable, and then correctly directed themselves to inquire whether there were circumstances which made it necessary for them to resort to some other method. Once they had thus directed themselves they were the tribunal to decide whether in fact they were compelled to adopt another method than the profits basis. In the language of Lord Cave already quoted, they were that rating authority which had to be satisfied that there were special circumstances making it necessary to depart from the recognized formula. It would be strange if this Court had the duty of deciding as a matter of law what circumstances in the case under consideration ought to have made the assessment committee and quarter sessions feel and find that they were unable to employ the recognized formula.

The first point taken by the respondents, that what is said to be the substantial question is not a question of law but of fact, appears to us, therefore, to be right. In view,

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(1) [1926] A. C. 331, 341.

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however, of the argument which was presented, it is desirable to state our views on the appellants' contentions that, in the facts of the case, there were special circumstances making it necessary that the assessment committee should not apply the profits basis formula. The special circumstances which, according to the appellants, the assessment committee and quarter sessions ought to have decided made it necessary for them to depart from the recognized formula, are set out in para. 14 of the special case.

The first is stated in these terms: "That by law the "respondents had so to fix their tariff that over a period of "years the revenue receipts would be sufficient to cover the "revenue expenditure, including interest and sinking fund "charges, together with such margin as the Electricity Com-"missioners might allow." To that it may be answered that the Metropolitan Water Board, who were the parties to and the subject of the *Kingston* case (1), have to do the same thing. True it is that the Water Board is required to do it each year and the respondents may do it over a period of years approved by the Commissioners, and the Commissioners have approved their doing it over a period of ten years, but that is fortuitous. If the assessment committee looks at accounts covering the latest period antecedent to the making of the rate, it may be easier to use them if they are balanced yearly than if they are only a part of accounts intended to be balanced over an incompleted period of ten years. The difference, however, between using the one set of accounts and the other is one of convenience and not of principle.

The second alleged special circumstance is said to be this: "That by law the respondents were enabled to budget for "revenue deficits in the earlier years of the tariff period by "being given power to pay interest out of capital and to "suspend the sinking funds, such revenue deficits to be made "good by surpluses to be derived from the larger volume of "business in the later years of the tariff period, and that "such revenue deficits have in fact been incurred." That provision is not new in legislation affecting statutory bodies

(1) [1926] A. C. 331.

with particular functions to perform but belonging to the same genus as the respondents. Our attention was called to the Port of London (Consolidation) Act, 1920, ss. 104 and 105, which enable that authority to suspend for ten years payments to the sinking funds which they are bound to provide to redeem or repay stock or money borrowed and redeemable or repayable in ninety years, and give power to charge to capital interest on moneys laid out on constructional work from which revenue may be derived after completion. Other examples of the same thing were given to us, such as the Grampian Electricity Supply Act, 1922, ss. 88 and 89, and the Electricity Supply Act, 1922, s. 1, of which s. 27 of the respondents' Act of 1926 is merely a repetition. Local authorities who own electricity undertakings, and there are many such all over the country, have similar powers under the Local Government Act, 1933, s. 198.

No case was cited to us where such undertakings as are carried on under or pursuant to the provisions of these various Acts were rated on any other formula than the profits basis, nor was the statement that all such undertakings were in fact rated on that basis challenged by counsel for the appellants. Furthermore, it was pointed out by Lord Atkin in *St. James' and Pall Mall Electric Light Co.* v. *Westminister Assessment Committee* (1) that: "the amount "of the landlord's or tenant's share of the fund does not "depend upon the use to which they put their shares when "received, whether voluntarily or under statutory obligation. "It is well established, for instance, that sinking funds to "satisfy capital obligations, whether imposed by statute or "not, are not permissible deductions in calculating the fund "to be divided." For rating valuation, therefore, payment or suspension of payments to the sinking fund is irrelevant. Again, whether or not interest is capitalized or paid can make no difference for rating purposes since interest payments are not deductible in arriving at gross rateable value. Such payments are an allocation out of profits made by the landlord and are a landlord's charge. They are no part of the measure of annual value which the assessing body is seeking to ascertain. As was said by Lord Davey in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1): "it is "perfectly immaterial what becomes of the amount which "is the result of carrying on the business on the hereditament "after paying the expenses and other outgoings. It is "immaterial whether it is applied for public uses, or the "payment of debt and other charges as in the present case, "or whether it goes into the pockets of the occupiers. What "you have to look at is this: Is the occupation 'beneficial' "in the sense in which the term is used in that passage?" The interest which a landlord may be called on to pay on the capital expended on the erection of the hereditament in question cannot be a measure of the rent which the hypothetical tenant would be ready to pay for his occupation of the hereditament, nor could it be a matter which the hypothetical tenant could be supposed to take into consideration in calculating what rent he could pay. "The real objection is," said Lord Loreburn L.C. in *Great Central Ry. Co.* v. *Banbury Union* (2), "that cost is not a measure of rent. Many houses constructed "at enormous expense notoriously fetch very moderate "rents." In these circumstances it is impossible to say that the second alleged special circumstance is such as could make it necessary or proper to depart from the profits basis.

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(1) [1934] A. C. 33, 42.

The third, fourth and fifth special circumstances were as follows: "(3.) That the accounts for 1933 had little relation "to the undertaking which had to be valued at April 1, 1934, "since at the latter date five areas were in general trading, "while in 1933 only two areas were engaged in general "trading. (4.) That the accounts for 1933 do not comprise "receipts (other than preliminary trading receipts) earned in "the area in which the said hereditament is situated. (5.) That "the grid was not completed until early in 1934 and that "the undertaking which had to be valued as at April 1, 1934, "was different in size, quality and user from that which earned "the receipts shown by the 1933 accounts." But these facts did not make the application of the profits basis impossible.

(1) [1901] A. C. 175, 186.

(2) [1909] A. C. 78, 87.

The rating authority dealt with all the facts available to them down to the date when the rate was made, namely, April 1, 1934. Accounts are only one form of material for consideration. The accounts for 1933 were the latest accounts available to them giving actual figures in relation to such trading as there had been. But there is nothing in the case to show that the authority did not take into consideration all such facts as could be ascertained down to the latest time antecedent to the date when they were making the rate. An authority such as the respondents, or any large electricity undertaking, cannot obviously create the whole of its system at once and will necessarily be coming into actual trading progressively and in new districts and parishes. In this connection it must be remembered that a rate once made is not final. A fresh proposal can be made at any time under s. 37, sub-s. 10, of the Rating and Valuation Act, 1925.

The sixth alleged special circumstance has only to be read to be recognized as argument and not as a fact or circumstance. It is stated as follows: "That notwithstanding the "results of the said accounts a tenant of the undertaking on "the basis of the definition of net annual value contained in "s. 22, sub-s. 1 (*b*), of the Rating and Valuation Act, 1925, "would be prepared to pay a rent for the said undertaking."

The seventh and last alleged special circumstance is said to be this: "That a large part of the gross receipts of the "undertaking are receipts for electricity which the respondents "sell immediately to the undertakers who generate it, thus "making the accounts of the undertaking of an unusual "character, the gross receipts being artificially inflated, which "materially affects the calculation usually made on the profits "basis to arrive at tenant's share." The transactions alluded to do not artificially inflate the respondents' gross receipts. It is a transaction which the respondents actually have to enter into in order to conduct the business which they are by statute created to conduct. They are obliged by statute to make the purchase and sale here referred to. What is bought back from the respondents may be less than they buy, or it may be the same quantity. When sold back to undertakers who generate, it is sold back at the respondents' statutory price, subject to certain rights reserved by the statute. The transactions alluded to are, therefore, real transactions forming a necessary part of the respondents' business. Moreover, if they inflate gross receipts, as it is said they do, that does not make it necessary to abandon the profits basis. That circumstance can be taken into account by the assessment committee like any other special feature in accounts which they have to consider when arriving at the rateable value and considering the tenant's share. In dealing with the tenant's share they are not bound to take gross receipts, and the percentage which they decide on is entirely a matter for them.

In our view, therefore, there were no special circumstances making it necessary to apply some other formula than that which is known as the profits basis.

The other question for the opinion of the Court is stated thus: Whether evidence relating to the estimates and accounts of the respondents subsequent to 1934 was rightly excluded. With regard to accounts, the assessment committee and quarter sessions looked at the 1933 accounts. The rate had to be made on April 1, 1934. Those accounts were taken into consideration because they represented facts. They contained statements of fact known at the time when the rateable value was being fixed.

In *Reg.* v. *London Brighton and South Coast Ry. Co.* (1) there occurs this passage in the judgment of the Court delivered by Coleridge J.: "The only remaining point in this case turns "upon the narrow question from what date the overseers "ought to make their calculations as to the assessment on "the company." This was a railway company in which there had been brought into action an additional mileage of track. "The date of the rate is November 20, 1847; and, as regards "the company, it is based on a half-yearly statement published "by them on August 10, but made up only to June 30 pre-"ceding. In the interval between June 30 and November 20, "the value of the working plant of the company had been, "as the sessions have found, not improperly, increased from

(1) 15 Q. B. 313, 367.

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"260,000*l.* to 350,000*l.* The deduction on this outgoing the "company claim to be entitled to; and we think they are "entitled to it. If this allowance had been attended with the "consequence of quashing the rate, we should have been of "a different opinion; but, as the rate may be amended, the "sessions ought to avail themselves of every light that can "be afforded them down to the latest period antecedent to the "actual making of the rate, in order to bring it to the greatest "possible accuracy. The overseers, in making a prospective "rate, are to make it on the supposed prospective value "ascertained by them, as well as they can, from the latest "evidence in their power as to antecedent value. It cannot "be required of them that the assumed value and the actual "value should correspond with perfectly minute accuracy. ". . . . So, now and equally, we think if the sessions are put "in possession of a fact which existed before the rate was "made, as it is not the absolute duty of the company to "volunteer information, if the fact will have the effect of "reducing the assessment and approximating it more nearly "to actual accuracy, they should amend the rate accordingly."

The Court was not there saying, and never has said, that quarter sessions or the assessment committee might pay regard to matters affecting the valuation which had occurred after the date of the making of the rate. What was said was that quarter sessions might look at matters which had occurred after the date at which the company's accounts were closed and between the date of the closing of the accounts and the date of the making of the rate. The Court was emphasizing that as the rate might be amended the sessions ought to avail themselves of every light that could be afforded them down to the latest period antecedent to the making of the rate. It is not an authority, nor is there any authority, laying down that the rateable value can be fixed on materials which only come into existence after the making of the rate. An assessment based on profits can be based on ascertained returns. The trend of the returns as shown by such accounts as are existent is material in considering the tenant's share, for it may reasonably be supposed that an ordinary tenant would pay regard to it, but the accounts and the trend of the returns must be examined as they are known at the date of the assessment and not in the light of facts which have only happened and come to be known afterwards, and which could not, therefore, have been considered by either the hypothetical tenant or the landlord at the date of the assessment. The rateable value is not to be fixed, though it may be amended, on the basis of the wisdom which comes after the event.

The Court is of opinion that quarter sessions was right in paying regard to the last accounts before the date of assessment and would not have been right in looking at the subsequent accounts.

The situation with regard to the estimates is quite different. The form of the question, that is to say, whether evidence relating to the estimates subsequent to 1934 was rightly excluded, suggests that these estimates were produced and tendered in evidence, but rejected as inadmissible. Para. 10 of the case, however, coupled with that we were told by counsel for the respondents took place at quarter sessions (and his statement about these facts was not challenged), shows that no such thing occurred. The estimates in question, according to para. 10, were estimates made by the respondents prior to April 1, 1934, for each area for each year up to 1939. Supplementing this with what we were told, it appears that these estimates were private documents of the respondents; that they were not tendered by the respondents or offered in evidence; that it was the appellants who asked that these documents should be produced and put before the court of quarter sessions; and that, when the respondents objected to produce them, the appellants sought a ruling that the respondents should be forced to produce them. It was in these circumstances, apparently, that quarter sessions ruled that they were inadmissible.

It is well established that an inquiry with the object of fixing the rateable value is not an inquisition, and the Court does not compel the production of private material. If when quarter sessions ruled, as the case states, that the documents were "inadmissible" they were using this expression in the

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sense that they would not force the respondents to produce them and to put them in evidence, the court of quarter sessions was clearly right. Furthermore, if the court of quarter sessions meant not merely that, but that in their view these estmates would not contain matter which it was right for them to take into consideration, they were, in our opinion, justified in this view, for these estimates were not, on the facts stated, documents containing any statements of actual facts. They were merely estimates containing hypothetical figures which might be used by the respondents for the purpose of framing tariffs. They did not represent any existent facts, nor did they include or record any facts which had already happened from which a deduction could be made about the probable trend of receipts. Every one of the assumptions which they made might be falsified by the actual events. There are no facts stated in the case which satisfy us that these estimates could have afforded, adopting the language already quoted, any light on the problem which had to be resolved " down to the latest period antecedent to the "actual making of the rate."

The answer, therefore, to the first question asked is : Yes. The answer to the second question is : Yes. The appeal is therefore dismissed.

Appeal dismissed.

Solicitor for appellants : *S. A. Jewers, Town Clerk, Barking.*
Solicitor for respondents : *Richard H. Fox.*

F. P. F.

In re JESTY'S AVENUE, BROADWAY, WEYMOUTH.

1940
April 16, 17.

Highways—Private street works—Street not repairable by the inhabitants at large—Cost of lowering gas main in—Charged on frontagers—Prima facie liability for expense on urban authority—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 153.

By a provisional apportionment under s. 6 of the Private Street Works Act, 1892, an urban authority sought to charge frontagers to a street not repairable by the inhabitants at large with the costs of lowering a gas main therein which if the roadway was made up would have to be lowered six or eight inches to provide minimum cover. By s. 1 of the Private Street Works Act, 1892, that Act is to be construed as one with the Public Health Acts:—

Held, that, by the terms of s. 153 of the Public Health Act, 1875, prima facie the liability for this expense lay on the urban authority, and therefore in the absence of evidence that the liability lay on the frontagers, justices were right in striking out this item from the provisional apportionment.

CASE stated by justices.

At a court of summary jurisdiction sitting at Weymouth an application was made by the town clerk of the borough for the justices to determine objections by frontagers of Jesty's Avenue, Broadway, Weymouth, to a provisional apportionment under the Private Street Works Act, 1892, s. 6, on the ground (inter alia) that certain of the expenses for the proposed works were improperly charged against the frontagers.

At the hearing the following facts were proved or admitted: The Private Street Works Act, 1892, had been adopted in the borough; the road, Jesty's Avenue, was a street not repairable by the inhabitants at large; the provisional specifications were based on the standard adopted by the corporation for private street works in the borough; there was in the road a gas main which, if the road were made up, would have to be lowered by an average amount of six to eight inches to provide minimum cover; the cost of lowering a gas main in other streets had always previously been charged to the frontagers by the corporation and 162*l.* 17*s.* 9*d.* had been included in the provisional apportionment as the cost of lowering the gas main in question.

Reported by C. G. Moran, Esq., Barrister-at-Law.

Jesty's Avenue, Broadway, Weymouth, *In re.*

There were thirty-four objectors who, being frontagers on the street, objected through their solicitor that (inter alia) the sum of 162*l.* 17*s.* 9*d.* was improperly charged against them and should not be included in the provisional apportionment.

The justices amended the provisional apportionment by striking out (inter alia) the item for the lowering of the gas main, but, on the application of the town clerk, stated this case for the opinion of the Court.

W. E. P. Done for the corporation. The decision of the justices to strike out from the provisional apportionment on the frontagers the expense of lowering the gas main is based on s. 153 of the Public Health Act, 1875. (1) That section applies to any street, whether it has been taken over by the local authority or not, as appears from s. 4 of that Act, the definition section. The provision as to the liability for the cost of the work is only made as between the urban authority and the gas undertakers. Nothing is said about liability where a street, not repairable by the inhabitants at large, is made up by an urban authority under the Private

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(1) Public Health Act, 1875, s. 153: "Where for any purpose "of this Act any urban authority "deem it necessary to raise, sink, "or otherwise alter the situation "of any water or gas pipes, mains "plugs or other water works or "gas works laid in or under any "street, they may by notice in "writing require the owner of the "pipes, mains, plugs or works to "raise, sink or otherwise alter the "situation of the same in such "manner and within such reason-"able time as is specified in the "notice; the expenses of or "connected with any such altera-"tion shall be paid by the urban "authority; and if such notice "is not complied with the urban "authority may themselves make "the alteration required: Pro-"vided . . . . That where under "any local Act of Parliament the "expenses of or connected with "the raising, sinking or otherwise "altering the situation of any "water or gas pipes, mains, plugs "or other water works or gas "works, are directed to be borne "by the owner of such pipes or "works, his liability in that "respect shall continue in the "same manner and under the "same conditions in all respects "as if this Act had not been "passed."

Private Street Works Act, 1892, s. 1: "This Act . . . . "shall be construed as one with the "Public Health Acts . . . ."

s. 2: "This Act shall extend "and apply to any urban sanitary "district in which it is respectively "adopted under the provisions of "this Act."

Street Works Act, 1892. When an urban authority cause a street not repairable by the inhabitants at large to be made up and find a gas main in the street they are in no way responsible for its presence or its situation. The frontagers are responsible, or their predecessor in title, the developer of the estate. If the making up of the street involves a lowering of the gas main that is a part of the levelling and "making good" of the street, the expense of which is by s. 6 of the Private Street Works Act, 1892, to be borne by the frontagers. In *Standring* v. *Bexhill Corporation* Lord Alverstone C.J. said: "In the course of the works a contractor may "come across a gas or water main which wants shifting . . . . "and it would be an extraordinary thing if a prudent surveyor "could not guard against this in a provisional estimate." (1)

[HILBERY J. If the urban authority had given notice to the gas undertakers to lower this gas main, clearly they could not put the expense of the work on the frontagers.]

That is so certainly in the first instance, but the urban authority did not act under s. 153 and have given no such notice.

Erskine Simes for the respondents was not called on to argue.

HAWKE J. The question is whether the cost of lowering the gas main in this street about six to eight inches to provide minimum cover is an expense which should properly be put on the frontagers. I content myself by saying that s. 153 of the Public Health Act, 1875, which is now part of the Act of Parliament under which this work was undertaken (for the Private Street Works Act, 1892, is to be construed as one with the Public Health Acts), provides quite clearly that such an expense is to be defrayed by the urban authority. I can well see the reason for that provision, although, if the construction of a section is clear, I do not know that one has to look for reasons for it. It is obvious that a gas main laid through a street may pass houses which it does not serve. Even if the main serves those houses, it may also serve many other houses in other parts of the district.

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(1) (1909) 73 J. P. 241, 242.

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Jesty's Avenue, Broadway, Weymouth, *In re.*

It is right and just, therefore, that this expense should be paid for by the inhabitants at large. I think, therefore, that this appeal should be dismissed.

Charles J. I agree. There was a gas main running down Jesty's Avenue and the corporation desired to lower it, if the road was made up, by an average amount of six to eight inches, to provide minimum cover. They then sought to charge that expense against the frontagers, but I have come to the conclusion that this expense is one to which s. 153 clearly applies. The justices held that that was so, and, in my opinion, their decision was correct.

Hilbery J. I agree. It appears to me that, as s. 153 of the Public Health Act, 1875, is to be read with and as part of the Private Street Works Act, 1892, under which the council was acting, s. 153 must be taken prima facie to decide the question of who is to bear the cost of lowering the gas main. That being so, I ask myself whether there is any finding of the justices here which forces me to the conclusion that that section, which is of prima facie application, is displaced so that the matter has become one which can be dealt with by a provisional apportionment made pursuant to a resolution under s. 6 of the Private Street Works Act, 1892, thus placing the burden on the frontagers. I find no such finding by the justices, nor have I heard any argument which satisfies me that as a matter of law the provisions of s. 153 are displaced. If the operation of s. 153 is not displaced, it plainly provides that the cost of lowering a gas main already in existence shall be borne by the inhabitants at large. That being so, we cannot place the burden of this expense elsewhere. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for Percy Smallman, Weymouth.*

Solicitors for the respondents: *Barnes & Butler, for J. W. Miller & Son, Poole.*

HOTEL REGINA (TORQUAY), LIMITED *v.* MOON.

1940
April 17, 18.

Revenue—Customs—Licensing—Sale of liquor by retail without licence—Person taking part in sale liable as seller—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 43 ; *s.* 50, *sub-s.* 3 ; *and First Schedule.*

The proprietors of an unlicensed hotel who allow their waiter or other servant to sell intoxicating liquor to guests staying at the hotel are themselves taking part in the sale, and may be convicted of selling liquor by retail without a licence, contrary to the Finance (1909–10) Act, 1910, s. 50, sub-s. 3 ; and it is no defence that the liquor was the legal property of the servant, and that the proprietors themselves do not receive any direct profit from the sale of the liquor.

Case stated by justices for the borough of Torquay.

On September 25, 1939, two informations were preferred by the respondent, Moon, under the Finance (1909-10) Act, 1910, s. 43, First Schedule, and s. 50, sub-s. 3, against the appellants (1), for that they on June 23 and 24, 1939, at the Hotel Regina, Victoria Parade, Torquay, did sell beer by retail contrary to the statute.

The appellants were the proprietors and occupiers of the hotel, which was not licensed. The directors of the company were Arthur Plum and his wife, who were also managers. They did not reside at the hotel, but attended there daily. On June 23 and 24, 1939, two officers of the Board of Customs and Excise booked a room at the hotel. At dinner in the hotel on June 23, the head waiter, one Tolchard, supplied them with two bottles of Whitbread's light ale, for which they paid 1*s.* 2*d.* Before receiving the order Tolchard said that any liquor which they might order would be sent for from licensed premises adjoining the hotel. At lunch and dinner on the following day they were again supplied by Tolchard and by Ralph, the

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(1) The Finance (1909–10) Act, 1910, s. 50, sub-s. 3, provides: "If any person sells by retail any "intoxicating liquor, for the retail "sale of which he is required to "take out a licence under this Act, "without a licence, he shall be "liable in respect of each offence, "at the election of the Commis-"sioners, either to an excise "penalty of 50*l.*, or to an excise "penalty equal to treble the "amount of the full duty."

"boots" at the hotel, with beer, for which they paid. The beer so supplied came from a cupboard in the hotel, which, as the appellants alleged, was provided by them for the waiters to store intoxicants purchased elsewhere by, and belonging to, guests staying in the hotel. The cupboard contained about sixty bottles of beer, stout and cider, in crates. None of the bottles bore labels indicating that they had been purchased by guests in the hotel. In the cupboard was a price list (issued by a licensed house near by) showing the prices which guests were to be charged for beer and cider. The beer and cider kept in the cupboard was used for sales to guests in the hotel, and the profits derived from sales were shared between Tolchard and Ralph. No portion thereof went to the appellants. Tolchard was authorized by the appellants to receive orders for liquor from the guests and to keep it in the cupboard.

On September 25, 1939, before the hearing of these informations, Tolchard and Ralph pleaded guilty to similar informations, and were convicted and fined.

Evidence was given for the appellants that Tolchard and Ralph had no authority to sell the beer contrary to law, and that Plum had no knowledge that they were so doing.

The justices found that Plum knew that his employees were selling the beer, and committing the offences to which they pleaded guilty. They convicted the appellants and fined them 25*l.* on each information.

The question for the Court was whether upon these facts the justices came to a correct decision in law.

G. O. Slade for the appellants. There was no sale in law by the appellants and they should not have been convicted. The Finance (1909-10) Act, 1910, s. 50, sub-s. 3, pre-supposes a sale which would be within the Sale of Goods Act, 1893, and in that it is distinguishable from the Licensing (Consolidation) Act, 1910, s. 65, under which an occupier is chargeable, and it is sufficient if (s. 85) "the Court are satisfied that a transaction "in the nature of a sale actually took place." There proof of consumption of the liquor by some person other than the occupier or his servant would be "evidence that the liquor "was sold by or on behalf of the holder of the licence." It would appear to follow from *Dunning* v. *Owen* (1) that the fact that the waiter and the "boots" owned and sold the beer would prevent the appellants from being convicted. *Dunning* v. *Owen* (1) was distinguished in *Mellor* v. *Lydiate*. (2) The ratio decidendi of the judgment of Darling J. in that case was that "subject to the provisions of this Act" (Licensing Consolidation Act, 1910, s. 65), a person not holding a justices' licence may lawfully sell intoxicating liquor. But these words, "subject to the provisions of this Act," do not occur in the Finance (1909-10) Act, 1910, s. 50. [He referred also to *Titmus* v. *Littlewood* (3); *Holt Brewery Co.* v. *Thompson* (4); and Paterson on Licensing, 47th ed., p. 467.] Secondly, the waiter and the "boots" here had no authority from the appellants to sell the beer and, therefore, the latter cannot be convicted as principals. The magistrates found that the appellants knew of the sale, but that only renders them liable to be charged as accessories.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent. The appellants were principals in the sale of the beer and were rightly convicted as such. *Mellor* v. *Lydiate* (2) decides that the word "sale" in the Licensing (Consolidation) Act, 1910, s. 65, cannot be restricted to a transaction which would fall within the Sale of Goods Act, 1893. Similarly, it is sufficient here that the appellants received an indirect benefit from the sale owing to the convenience enjoyed by the guests. They were concerned with their servants, who had the legal ownership in the goods. In such a case as the present the sale is not confined to sale by the legal owners. If the sale took place on the appellants' premises by their servant, or with their knowledge through the manager, it is a sale by the appellants within this section.

G. O. Slade in reply. *Mellor* v. *Lydiate* (2) concerned the Licensing (Consolidation) Act, 1910, s. 65, and does not affect s. 50, sub-s. 3, of the Finance (1909-10) Act, 1910.

(1) [1907] 2 K. B. 237.
(2) [1914] 3 K. B. 1141.
(3) [1916] 1 K. B. 732.
(4) (1920) 123 L. T. 56.

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Hotel Regina (Torquay), Ld. *v.* Moon.

Hawke J. The appellants provided the accommodation for the sale of the beer, and light and heat and the usual accessories in a place of residence. They attracted purchasers and thereby introduced them to the persons who sold the liquor. They provided the store cupboards in which the liquor was kept, and the glasses or other receptacles from which it was consumed. They had an indirect interest in the transaction being carried through, and they intended that it should be carried through. The sale of the beer tended to improve and increase their own business and by reason of the perquisites to the servants they could probably hire these servants at lower wages than would otherwise be the case. It has been argued for the appellants that only the person who has the actual property in the goods which pass on the sale can be convicted under the statute. We do not agree with that. The facts of this case show that the appellants took part in the sale and are liable to be fined under the statute because they had no excise licence. For these reasons, in my opinion, the magistrates came to a correct determination in law, and the appeal must be dismissed.

Charles J. I agree.

Hilbery J. I agree, and only desire to add a few words on what lies at the basis of the argument addressed to us by Mr. Slade. I refer to the proposition that the only person who can effect a contract of sale is the person in whom rests the ownership of the goods. That statement is, in my view, quite fallacious. It is true that under the contract of sale the legal property in the goods is passed and that a vendor must be able to pass the property, but that is a different thing from saying that the only person who can sell an article is the legal owner. For example, goods held on sale or return can be sold by the person entrusted with them, and it is a good sale by him, although he has not the legal ownership of the goods, because he has sufficient property to pass a good title. Unless it can be said here that the ownership in this beer was in Tolchard and, therefore, that Tolchard was the only person who could sell, the argument for the appellants fails. I agree with what the Attorney-General has said, and Mr. Slade in his reply conceded that *Mellor* v. *Lydiate* (1) could not have been decided as it was if that argument for the appellants was correct. If we treat this case as a matter of every day affairs and not as an occasion for legal sophistry, it would appear simple.

Appeal dismissed.

Solicitors for appellants: *W. Crimp & Co., for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

Solicitor for respondent: *The Solicitor for Customs and Excise.*

F. P. F.

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(1) [1914] 3 K. B. 1141.

1940
April 15, 18.

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Master and servant—Servant's action in High Court for damages for negligence of employers' servants—Plaint in county court under Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 1*—Recovery of damages in county court—Effect on High Court action.*

Where an employee brought an action in the High Court for injuries caused by the negligence of the employers' servants, and subsequently, in anticipation of a plea of common employment in that action, filed a plaint in the county court in respect of the same cause of action under the Employers' Liability Act, 1880, and recovered compensation thereunder :—

Held, that his action in the High Court was barred.

PRELIMINARY POINT under Order XXV., r. 2.

The plaintiff, a labourer employed by the defendants, was injured in the course of his work while transporting heavy steel plates from one part of the defendants' works to another on a truck supplied by the defendants. Through the alleged negligence of the defendants' servants, the truck collapsed under the weight of the steel plates, and the plaintiff was injured.

On October 3, 1938, the plaintiff began an action in the High Court claiming damages. On February 10, 1939, probably in anticipation of the raising by the defendants of the plea of common employment, which in fact was pleaded by them by an amended defence on February 14, 1939, the plaintiff issued a plaint in the Edmonton County Court making a claim under the Employers' Liability Act, 1880, by s. 1 of which a workman claiming such damages is placed in the same position as one not in the defendants' employment so that the defence of common employment in actions under that Act is no longer available, but by s. 3 the amount of damages recoverable is limited. The particulars of claim in the county court plaint reproduced all the relevant allegations in the High Court action. In the county court case the defendants denied liability, but brought into court 468*l.*, the maximum amount which the plaintiff could recover under s. 3 of the Act of 1880. The plaintiff took that money out of court in satisfaction of his claim on March 30, 1939. Thereupon the defendants re-amended their defence in the High Court action, setting forth the above facts, and concluding: "The defendants will contend that, by reason of the premises, "the plaintiff is debarred from claiming or recovering any "sum from the defendants in this action."

Thereupon, under Order XXV., r. 2, of the Rules of the Supreme Court, 1883, an order was made in Chambers that the above issue should be set down for hearing before the trial of the action.

C. L. Henderson for the defendants. The cause of action in this case under the Employers' Liability Act, 1880, in the county court and in the common law action in the High Court is the same, namely, the alleged negligence of the defendants' servants whereby injury was caused to the plaintiff. All that the Act of 1880 did was to deprive a defendant of the plea of common employment, leaving the action unaffected in other respects, at least as far as this case is concerned, and conferred no new cause of action: *Thomas* v. *Quartermaine.* (1) [*Wilsons and Clyde Coal Co., Ld.* v. *English* (2) was also referred to.] Sect. 3 of the Act of 1880, which limits the amount recoverable under the Act, has no reference to the cause of action, but merely modifies a successful action thereunder. It does not lay down a measure of damages: *Bortick* v. *Head, Wrightson & Co.* (3) per Cave J. The test whether a previous action is a bar to subsequent proceedings is not whether the damages sought to be recovered are different, but whether the causes of action are the same: *Gibbs* v. *Cruikshank.* (4) The plaintiff having secured damages under the Act of 1880, cannot again recover damages at common law in respect of what is the same cause of action: *Darley Main Colliery Co.* v. *Mitchell.* (5) [*Munday* v. *Thames Ironworks and Shipbuilding Co., Ld.* (6) was also referred to.]

[He was stopped.]

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(1) (1887) 18 Q. B. D. 685.
(2) [1938] A. C. 57.
(3) (1885) 53 L. T. 909, 910.
(4) (1873) L. R. 8 C. P. 454, 460
(5) (1886) 11 App. Cas. 127, 132.
(6) (1882) 10 Q. B. D. 59.

W. B. Frampton for the plaintiff. The county court proceedings and this action are quite distinct and produce different results to a successful plaintiff. If this is not so, then, if a plaintiff were to elect to pursue his common law remedy in the High Court, the defendant could amend his pleading more than six months after the accident, by adding a defence of common employment, with the result that the plaintiff would be deprived of any remedy for his injuries, because by s. 4 of the Act of 1880 the action under the Act must be commenced within six months from the occurrence of the accident. In s. 5 of the Act the Legislature has enacted that any sum awarded to a workman under any other Act in respect of the same cause of action shall be deducted from compensation awarded under the Act, but does not say anything about money recovered at common law. In *Wood* v. *Weber* (1) which is the only case having any bearing on this point, the High Court action had been remitted to the county court and it was held that the plaintiff was entitled to add to his particulars a claim under the Employers' Liability Act, 1880. Had the actions not been distinct no such order would have been required. [*Brunsden* v. *Humphrey* (2), and *E. E. and Brian Smith* (1928), *Ld.* v. *Wheatsheaf Mills, Ld.* (3), were also referred to.] The Act of 1880 contains no such provision as that in s. 29 of the Workmen's Compensation Act, 1925, whereby a workman who has recovered compensation under that Act cannot also recover damages independently of that Act. That omission must have been well considered. [*Smith* v. *Baker (C.) and Sons* (4), *Wilsons and Clyde Coal Co.* v. *English* (5), and *James Nimmo & Co., Ld.* v. *Connell* (6), were referred to.]

1940. April 18. MACNAGHTEN J. stated the facts and continued: This is apparently the first time that a workman who has recovered judgment in the county court under the Employers' Liability Act, 1880, has sought to pursue a claim

(1) (1908) 24 Times L. R. 587.
(2) (1884) 14 Q. B. D. 141.
(3) [1939] 2 K. B. 302, 310.
(4) [1891] A. C. 325.
(5) [1938] A. C. 57.
(6) [1924] A. C. 595.

for negligence in respect of the same injury in the High Court. On behalf of the plaintiff, it was pointed out that the Employers' Liability Act, 1880, contains no such provision as is contained in s. 29 of the Workmen's Compensation Act, 1925, which expressly provides that a workman who has recovered compensation under that Act cannot pursue any other remedy, that is, in the High Court or in the county court, at common law, or under the Employers' Liability Act, 1880; and it was argued that the cause of action under the Employers' Liability Act, 1880, was different from that of negligence at common law. On the other side, it was said that a claim under the Employers' Liability Act, 1880, is in reality based on negligence and on nothing else, and that the Act conferred no new cause of action at all.

It is necessary, therefore, to look at the Employers' Liability Act, 1880, to see whether in fact it gives a new cause of action unknown to the common law. Sect. 1 provides as follows: "Where after the commencement of this Act personal injury "is caused to a workman: (1.) By reason of any defect in the "condition of the ways, works, machinery, or plant connected "with or used in the business of the employer; or (2.) By reason "of the negligence of any person in the service of the employer "who has any superintendence entrusted to him whilst in the "exercise of such superintendence; or (3.) By reason of the "negligence of any person in the service of the employer to "whose orders or directions the workman at the time of the "injury was bound to conform, and did conform, where such "injury resulted from his having so conformed; or (4.) By "reason of the act or omission of any person in the service "of the employer done or made in obedience to the rules or "bye-laws of the employer, or in obedience to particular "instructions given by any person delegated with the authority "of the employer in that behalf; or (5.) By reason of the "negligence of any person in the service of the employer who "has the charge or control of any signal, points, locomotive "engine, or train upon a railway, the workman, or in case "the injury results in death, the legal personal representatives "of the workman, and any persons entitled in case of death, "shall have the same right of compensation and remedies "against the employer as if the workman had not been a "workman of nor in the service of the employer, nor engaged "in his work." Then the Act goes on to make certain exceptions and to limit the amount recoverable, and the time within which the action must be brought. It also provides for deduction from the money recoverable by the workman of any penalty imposed on the employer and paid to the workman pursuant to any other Act of Parliament, and that every action for recovery of compensation under the Act is to be brought in the county court, but may, on the application of either plaintiff or defendant, be removed into a superior court.

In my view, there is nothing in the Employers' Liability Act, 1880, which confers on the injured workman any cause of action different from that which by the law of England but for the doctrine of common employment he could have maintained at common law. The real effect of the Employers' Liability Act, 1880, is to preclude the employer, when sued in such an action, from setting up the defence of common employment. The question, however, is, I think, concluded by authority. Counsel engaged in the case have assisted me by referring to all the cases which have any bearing on the matter, direct or indirect, and I think it only necessary to refer now to *Thomas* v. *Quartermaine.* (1) That was a decision of the Court of Appeal, consisting of Lord Esher M.R., Bowen and Fry L.JJ. In his judgment, Bowen L.J. said (2) : " Two "alternative views have been submitted to us as to the effect of "the Employers' Liability Act, 1880. Is the true conclusion "that the Act has removed certain special obstacles to a work-"man's right to sue which would not have existed in the case of "other persons, and which had been held previously to arise by "implication out of the relation of master and servant ; and "that the Act has only placed an injured workman (as regards "his remedies) in the same position (with specified exceptions) "as he would have occupied if he had not been in the master's "employ ? Or has the Act gone further, and imposed on

(1) 18 Q. B. D. 685. (2) Ibid. 691.

"masters new duties and liabilities towards their servants "which the masters would not be under towards the general "public or the servants of anybody else? This is the first "question we have to solve." Then Bowen L.J. proceeds to deal with the various arguments which led to the conclusion expressed in his judgment (1): "The true view in my opinion "is that the Act, with certain exceptions, has placed the "workman in a position as advantageous as but no better than "that of the rest of the world who use the master's premises "at his invitation on business. If it has created any further "or other duty to be fulfilled by the master I do not know "what it is, how it is to be defined, or who is to define it." Judgment to the same effect was delivered by Fry L.J. Although Lord Esher M.R. dissented from the conclusion at which Bowen and Fry L.JJ. arrived, his decision was not on the point at issue in this case, but on the question whether or not the doctrine of volenti non fit injuria applied. The majority of the Court held that it did apply. Lord Esher M.R. thought that it did not.

For these reasons, I have come to the conclusion that the issue submitted to me must be decided in favour of the defendants, and that the action must stand dismissed.

Action dismissed.

Solicitors for plaintiff: *Scott Duckers & Co.*
Solicitor for defendants: *W. Stanley Eastburn.*

(1) 18 Q. B. D. 693.

W. L. L. B.

1940
April 25, 26.

GASQUE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Limited company registered in Guernsey—"Resident or domiciled out of the United Kingdom"—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18.

A limited company is capable of having a domicil. Its domicil is the place of its registration and that domicil clings to it throughout its existence.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on October 31, 1938, the appellant, Mrs. M. M. Gasque, appealed against assessments to sur-tax for the years 1935–36 and 1936–37, in the sums of 43,461*l.* and 52,670*l.* respectively. The assessments in question included the sums of 29,724*l.* and 51,745*l.* respectively, which amounts had been deemed to be the appellant's income in accordance with the provisions of s. 18 of the Finance Act, 1936. (1)

Under an agreement dated January 21, 1936, the appellant, who was at all material times an American citizen but ordinarily resident in the United Kingdom, sold her life interest in the estate of C. W. Gasque, deceased, to a company called M. D. Company, Ld., for 200,000*l*., and the sole question argued before the Commissioners was whether this company was a person resident or domiciled out of the United Kingdom within the meaning of s. 18 of the Act of 1936.

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(1) Finance Act, 1936, s. 18: "For the purpose of preventing "the avoiding by individuals "ordinarily resident in the United "Kingdom of liability to income "tax by means of transfers of "assets by virtue or in consequence whereof, either alone or "in conjunction with associated "operations, income becomes payable to persons resident or "domiciled out of the United "Kingdom, it is hereby enacted "as follows: (1.) Where such an "individual has by means of any "such transfer . . . . acquired any "rights by virtue of which he has, "within the meaning of this "section, power to enjoy, whether "forthwith or in the future, any "income of a person resident "or domiciled out of the United "Kingdom which, if it were "income of that individual "received by him in the United "Kingdom, would be chargeable "to income tax by deduction or "otherwise, that income shall, "whether it would or would not "have been chargeable to income "tax apart from the provisions "of this section, be deemed to "be income of that individual "for all the purposes of the "Income Tax Acts."

The M. D. Company was incorporated on August 7, 1920, in Guernsey and on January 21, 1936, the appellant acquired the beneficial interest in all the issued shares of the company. Mr. V. M. G. de Vic Carey of Guernsey, who resided there, and Messrs. Baker and Slade, both of whom resided in this country, were appointed directors of the company on January 21, 1936. The meetings of the directors (up to and including one on January 31, 1936) were held in Guernsey, but the one on March 18, 1936, and subsequent meetings were held in London, and as from January 31, 1936, some of the company's business was transferred to London. It is necessary for a company registered in Guernsey if it wishes to carry on a business in the United Kingdom to comply with the provisions of s. 353 of the Companies Act, 1929. This was done by the M. D. Company on March 9, 1936.

Mr. J. J. Baker, chartered accountant, and a director of the company, giving evidence before the Commissioners, stated that he had attended all directors' meetings held in London and that Mr. Carey was not present at any of these meetings, and that since January, 1936, Mr. Carey had not been consulted either by him or his co-directors. The minutes were sent to Guernsey for Mr. Carey's information and signature, but notices of directors' meetings were not sent to him. He (Mr. Baker) had not attended any annual general meetings in Guernsey, and he did not think that any had been held since he had been appointed director. He agreed that under art. 51 of the articles of association, annual general meetings should be held in Guernsey. The seal of the company was in Guernsey, and it had not been used in London as it had not been required, and the company was registered in Guernsey under Guernsey law. The company had a bank account in Guernsey, but it had not been operated on since January, 1936. The company's registered office was in Guernsey, and as a result of the directors' meetings being held in England the company had to pay 50*l.* a year corporation tax in Guernsey. Prior to the issue of the shares to the appellant's nominees in January, 1936, the company had carried on the business of a property owning and investment company in Guernsey.

Mr. de Vic Carey in evidence agreed that he no longer received notices of meetings, but said he had not waived his right to receive them.

It was contended on behalf of the appellant: (1.) that after January 31, 1936, M. D. Company, Ld., was a person resident in the United Kingdom and was not a person resident or domiciled out of the United Kingdom within the meaning of s. 18 of the Finance Act, 1936; and (2.) that, accordingly, the income of the company included in the assessment under appeal should not be deemed to be the income of the appellant.

It was contended on behalf of the Commissioners of Inland Revenue: (1.) that the company was resident out of the United Kingdom for both the years in question; (2.) that the word " domiciled " in the said section, referred to a company as well as to an individual; (3.) that the domicil of the company was originally in Guernsey and had never been changed; and (4.) that for both the years in question, the assessments had been rightly made to cover the income transferred to the company and should be confirmed.

The Commissioners gave their decision as follows: "In "this case it was contended on behalf of the appellant that "a company incorporated under the laws of Guernsey, named "M. D. Company, Ld., was not a person resident or domiciled "out of the United Kingdom within the meaning of those "words in s. 18 of the Finance Act, 1936, for either of the "fiscal years 1935–36 or 1936–37. As to residence, on the "evidence adduced before us we find that as the company was "admittedly functioning solely in Guernsey for at least ten "months in the year 1935–36 it was resident in Guernsey for "the whole of that fiscal year, and that for the year 1936–37, "notwithstanding the fact that directors' meetings and some "business were transferred to London and that the company "might also be resident there, it was still resident in Guernsey. "As to domicil, we hold that the word ' domiciled ' in the said "section is applicable to companies as well as to individuals "and that on the analogy of individuals the domicil of origin "of this company was in Guernsey and that no effective "action had been taken to displace such domicil in either "of the years in question, and that accordingly we find that "the company was domiciled out of the United Kingdom "for both years. We leave the figures to be agreed between "the parties."

The figures were subsequently agreed and the assessments were confirmed.

The appellant in due course required the Commissioners to state a case for the opinion of the High Court.

Raymond Needham K.C. and *J. S. Scrimgeour* for the appellant.

The Solicitor-General (*Sir Terence O'Connor*) and *J. H. Stamp* for the Crown..

MACNAGHTEN J. This is an appeal against assessments to sur-tax. The appellant, Mrs. M. M. Gasque, is the widow of Mr. Clarence Warren Gasque, who died on October 12, 1928, and by his will bequeathed to her a life interest in his estate. Under an agreement dated January 21, 1936, the appellant sold her life interest to a company, called the M. D. Company, Ld., for 200,000*l.* payable without interest by annual instalments of not less than 25,000*l.* The appellant is an individual "ordinarily resident in the United Kingdom." Income of the M. D. Company, Ld., has been included in the assessments to sur-tax made upon her for the years 1935–36 and 1936–37 on the ground that the sale of her life interest to that company in January, 1936, was a "transfer of assets" whereby income became payable to a "person resident or domiciled out of the "United Kingdom" within the meaning of s. 18 of the Finance Act, 1936, and that under the provisions of that section the income of the M. D. Company, Ld., is to be "deemed" the income of the appellant for all the purposes of the Income Tax Acts. The only question at issue on this appeal is whether the M. D. Company, Ld., is a "person resident or domiciled "out of the United Kingdom" within the meaning of that section.

It was suggested by Mr. Needham on behalf of the appellant that by the law of England a body corporate has no domicil. It is quite true that a body corporate cannot have a domicil in the same sense as an individual any more than it can have a residence in the same sense as an individual. But by analogy with a natural person the attributes of residence, domicil and nationality can be given, and are, I think, given by the law of England to a body corporate. It is not disputed that a company formed under the Companies Acts, has British nationality, though, unlike a natural person, it cannot change its nationality. So, too, I think, such a company has a domicil —an English domicil if registered in England, and a Scottish domicil if registered in Scotland. The domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence.

In *Todd* v. *Egyptian Delta Land and Investment Company, Ld.* (1), Sargant L.J. said (2) "In my judgment the provisions "of the [Companies (Consolidation) Act,] 1908, not only enable "a company to be born here, but necessarily keep the company "domiciled here throughout its existence. And, though "residence is less than domicil, and may often occur without "domicil, yet I doubt whether an obligatory and continuous "domicil in England, such as seems to me to result from the "provisions of the Act of 1908 in the case of such companies "as this, does not necessarily involve residence at the place "of domicil." The decision of the Court of Appeal was reversed in the House of Lords (1) but the reversal did not, I think, diminish the weight to be attached to what the Lord Justice had said on the subject of the domicil of companies.

The Solicitor-General called my attention to a case in the American Courts of *Bergner & Engel Brewing Company* v. *Dreyfus*. (3) The judgment in that case was delivered by Holmes J. Any opinion of that very eminent judge, more

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(1) [1929] A. C. 1; 14 Tax Cas. 119.

(2) [1928] 1 K. B. 152, 173; 14 Tax Cas. 119, 136.

(3) (1898) 70 Am. State Rep. 251.

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Macnaghten J.

particularly on any question relating to the common law of England, is entitled to the highest respect in any English Court. The headnote to that case, which correctly represents the decision, is this: "A corporation has its domicil "in the jurisdiction of the state which created it, and, "as a consequence, has no domicil anywhere else." In the absence of evidence to the contrary the law of Guernsey on the subject of the domicil of limited companies must be taken to be the same as the law of England, and, that being so, in my opinion, the decision of the Commissioners on the question of domicil was right, and that is sufficient to dispose of this appeal.

As to the "residence" of the M. D. Company, Ld., I only desire to say this. From 1920 to January 31, 1936, it is plain that the company resided in Guernsey and nowhere else. In the case the Commissioners say that after January, 1936, the "business" of the company was transferred to London, while in their findings they say that "some business" was transferred to London after that date. There was evidence to support the conclusion of the Commissioners that the company did not abandon its residence in Guernsey, and it may be that the business transferred to London was of so trifling a character that it did not give the company an additional "residence" in London.

In my opinion, the decision of the Commissioners was right and ought to be affirmed.

Solicitors for appellant: *Lovell, White & King.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

1940
Jan. 11;
Mar. 20.

HARLING (INSPECTOR OF TAXES) *v.* CELYNEN COLLIERIES WORKMEN'S INSTITUTE.

Revenue—Income tax—Loss in trade—Loss deductible or set off against profits for six following years—Inclusion in the six years of the first year after year of loss—Finance Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 33, *sub-s.* 1.

By s. 33, sub-s. 1, of the Finance Act, 1926, where a person has in any trade, profession or vocation sustained a loss in respect of which relief has not been wholly given under the Income Tax Acts, that loss may be carried forward and, as far as may be, deducted from or set off against the profits on which he is assessed under Sch. D in respect of his trade, profession or vocation for the six following years of assessment:—

Held, that the year following the year of loss, in which year the loss forms the basis of assessment, is not included as one of the six following years.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners for the Bedwellty Division, Monmouth, held on February 2, 1938, the Celynen Collieries Workmen's Institute ("the respondents") appealed against an assessment under Sch. D to the Income Tax Acts in respect of the profits of a cinema and dance hall amounting to 451*l*. for the year ended April 5, 1938, less losses brought forward, 28*l*.

In the assessment appealed against allowance was made only in respect of a loss of 28*l*. shown for the year ended December 31, 1933 (the corresponding year of assessment being 1934-35). The respondents claimed relief under s. 33 of the Finance Act, 1926 (1), in respect of the unexhausted balance of a loss of 1639*l.* incurred and shown by the accounts for the year ended December 31, 1930 (corresponding year of assessment 1931–32). The amount of the unexhausted balance not allowed up to the year of assessment 1936–37 amounted to 426*l.* The appellant (the Inspector of Taxes) contended that relief was allowable "as far as may be" against the assessments for the six years immediately following the year of loss and no further.

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(1) Finance Act, 1926, s. 33:—"Where a person has in any trade, "profession or vocation carried on "by him . . . . sustained a loss ". . . . in respect of which relief "has not been wholly given under "section thirty-four of the Income "Tax Act, 1918 (which relates to "relief in respect of certain losses), "or under r. 13 of the Rules appli-"cable to Cases I. and II. of Sch. D "(which provides for the setting "off of losses against profits or "gains in a distinct trade), or "under any other provision of the "Income Tax Acts, he may claim "that any portion of the loss for "which relief has not been so given "shall be carried forward and, as "far as may be, deducted from or "set off against the amount of "profits or gains on which he is "assessed under Schedule D in "respect of that trade, profession "or vocation for the six following "years of assessment."

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The question in dispute was whether the words in s. 33, sub-s. 1, of the Act of 1926 "for the six following years of "assessment" included the year of assessment 1937–38 in this particular case.

It was contended for the respondents that under s. 33 of the Act of 1926 they were entitled to set off the unexhausted balance of the loss of 1639*l.* against the assessment of 451*l.* together with 25*l.* of the 28*l.* loss incurred in the year ended December 31, 1933, and, therefore, that the assessment should be reduced to nil; that "the six following years of assessment" must include the year of assessment, 1937–38, because there was not and could not be an assessment for the year 1931–32; and that *Inland Revenue Commissioners* v. *Scott Adamson* (1), and the dictum therein of Lord Morison (that s. 33 did not refer to fictional losses, but to actual losses) had no application to the case, the respondents being an old-established concern and not a new business.

The appellant, the Inspector of Taxes, contended (1.) that s. 33 referred to an actual loss sustained in any year and not to a statutory loss computed by reference to the loss actually sustained in a preceding year; (2.) that relief was allowable "as far as may be" against the assessments for the six years immediately following the year of loss, but no further; (3.) that in this particular case it happened that the assessment for the year 1931–32, which was the year immediately following the year of loss was "nil," and, therefore, the set off under s. 33 was nil, but the year 1931–32 was the first year subsequent to 1930, and, therefore, the year 1936–37 was the sixth and final year of assessment for which relief in respect of the unexhausted balance of the loss of 1639*l.* could be allowed; and (4.) that *Inland Revenue Commissioners* v. *Scott Adamson* (1), and the dictum therein of Lord Morison clearly showed that s. 33 referred to an actual loss.

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(1) 1933 S. C. 23, 29; 17 Tax Cas. 679, 686.

The Commissioners were of opinion that the balance of the loss incurred in 1930 was allowable as far as might be against the assessment for 1937–38 under s. 33 of the Act of 1926. The assessment was, therefore, amended to 451*l.*, less losses forward 451*l.*

The appellant thereupon required this case to be stated.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the appellant.

F. Grant for the respondents.

Cur. adv. vult.

1940. March 20. LAWRENCE J. The question in this case is as to the meaning of the words in s.33, sub-s. 1, of the Finance Act, 1926: "Where a person has in any trade . . . . sustained "a loss . . . . in respect of which relief has not been wholly "given . . . . he may claim that any portion of the loss for "which relief has not been so given shall be carried forward "and, as far as may be, deducted from . . . . the amount of "profits or gains on which he is assessed under Sch. D in "respect of that trade . . . . for the six following years of "assessment."

Do the six years of assessment include the year in which the loss forms the basis of assessment? The respondents contend that as in the year of assessment which follows the year in which the loss was incurred no deduction can be made, it cannot have been the intention of the Legislature to count that year in the six years. In the present case the taxpayer sustained a loss in the year ending December 31, 1930, which formed the basis of assessment for the year April 5, 1931–April 5, 1932, and the revenue authorities contend that no part of this loss can be carried forward and deducted from profits after the year April 5, 1936–April 5, 1937, while the respondents contend and the Commissioners have held that

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(1) 1933 S. C. 23, 29; 17 Tax Cas. 679, 686.

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Lawrence J.

the loss can be carried forward and deducted from the profits of the year April 5, 1937–April 5, 1938.

I have come to the conclusion that the decision of the Commissioners is correct. The section provides that the loss shall be carried forward and as far as may be deducted from the profits for the six following years, and in my opinion it cannot be said that the loss is carried forward and as far as may be deducted in the year in which the loss forms the basis of assessment. It cannot, I think, be fairly said that a loss may be carried forward and deducted in a year in which it can neither be deducted nor have any effect. The words "as far as may be" are perfectly intelligible in after years because in any of the six following years there may be no profits from which to deduct the loss, but in the year in which the loss itself is the basis of assessment there cannot be any profits to deduct from and to use the words "as far as may be" as applying to that year seems to me an ironical and unnatural use. The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Collyer-Bristow & Co., for D. Granville West, Newbridge, Mon.*

W. L. L. B.

VRONDISSIS *v.* STEVENS.

1940
April 22, 23,
24, 25;
May 1.

Insurance (Marine)—Freight—Loss not recoverable if arising from loss of vessel—Constructive total loss of vessel—Repair impossible—Repair possible, but cost exceeding repair value—Assured's right to recover.

By a policy of marine insurance which was underwritten by the defendant and others the plaintiff, a shipowner, insured against loss of freight for a period, the policy providing that "in the "event of total loss and/or constructive and/or arranged and/or "compromised total loss of vessel, total loss and/or constructive "total loss of freight arising therefrom is not recoverable." The plaintiff having brought an action on the policy for loss of freight, an issue was directed to be tried whether, the terms of the policy, the total, or, alternatively, constructive total loss of freight, and the constructive total loss of the vessel being admitted by the parties, the plaintiff was entitled to recover. On the trial of the issue:—

Held, that if the ship were properly abandoned as a constructive total loss on account of the actual loss appearing to be unavoidable, repair being physically impossible, the loss of freight arose from that constructive total loss, but if freight were lost because, although the ship could have been repaired and enabled to complete the voyage, it would have cost more to effect such temporary repairs, allowing for general average contribution, than the repaired value of the ship, the loss of freight could not be said to arise from the constructive total loss of the ship.

ISSUE tried by Atkinson J.

By a policy of marine insurance which was underwritten by the defendant and others, the plaintiff, owner of the ship *Antonios Vrondissis*, insured against loss by (inter alia) perils of the sea of freight valued at 3000*l.* from October 15, 1935, to October 15, 1936. The policy provided that "in the event "of total loss and/or constructive and/or arranged and/or "compromised total loss of vessel, total loss and/or constructive "total loss of freight arising therefrom is not recoverable."

In an action on the policy for loss of freight, the plaintiff alleged that "on or about August 3, 1936, while the said "steamship was on a voyage from Kem to Hull, with a cargo "of wood, the freight thereon became a total, or, alternatively, "a constructive total, loss by perils of the sea, or other perils, "losses or misfortunes within the meaning of the said policy."

The following were given as particulars of that allegation: "Shortly after sailing from Kem with the said cargo on board, "the said steamship, on August 3, 1936, struck a reef or rock "in the vicinity of the Kem Reef and was so severely damaged "thereby that she had to be beached. After extensive salvage "operations and the discharge of part of the said cargo, the "said steamship on or about August 13 was towed to Archangel "where, on or about August 15, she was again beached in the "river and there remained filling with water at every tide. "The remainder of the said cargo was discharged at Archangel, "but no dry-dock was available at Archangel and the said "damage was so severe that it was impossible to repair the "said vessel so as to enable her to complete the said voyage "with the said cargo on board, and the said voyage was "abandoned. Alternatively, the said damage was such that "a prudent uninsured owner would not have proceeded with "the said voyage and/or was such that to repair the said "damage so as to enable the said steamship to complete the "said voyage with the said cargo on board would have cost "more than her value when so repaired and/or more than the "benefit to be derived therefrom." In his defence the defendant pleaded that by reason of the facts and matters in the particulars of the points of claim the *Antonios Vrondissis* became a constructive total loss and notice of abandonment was given to her hull underwriters by the plaintiff on or about August 6, 1936, and any total or constructive total loss of freight was consequently not recoverable under the express terms of the policy and/or of the contract of insurance on freight. As particulars, reference was made to the provision in the policy already set out, and the particulars went on " and any total, "or alternatively any constructive total, loss of freight arose "from the loss of the vessel as aforesaid."

On April 12, 1939, an order was made that, the terms of the policy and slip being admitted, the defendant (for the purpose of argument only) admitting the allegations made in the points of claim, and the plaintiff admitting that the *Antonios Vrondissis* was in fact a constructive total loss and that notice of abandonment was given to the underwriters on hull on August 6, 1936, there be tried as a preliminary issue the point of law raised in the pleadings whether or not on a proper construction of the true contract of insurance the plaintiff was entitled to recover from the defendant.

Cyril Miller for the plaintiff. It is admitted that the ship was a constructive total loss and that the hull underwriters have paid thereon, but the plaintiff is entitled to recover if the loss arose from the fact that the continuance of the voyage was commercially impossible. The special clause in the policy, which provides that in the event of the total loss of the ship, total and/or constructive total loss of freight arising therefrom shall not be recoverable, only excludes the recovery of freight in cases where the loss of freight is directly and solely due to the total and/or constructive total loss of the ship. The object of the clause is to exclude the recovery of freight by the shipowner where in fact there is no freight in course of being earned, that is, where the ship is in ballast or without cargo. Where the ship is actually loaded the only test to be applied is whether the cost of so repairing her as to enable her to complete her voyage with her cargo would exceed her repaired value. Even if it were possible for the underwriter to argue in this case that the loss of freight arose from the constructive total loss of the ship, as a matter of causation in law the assured would still be entitled to say that the loss also arose from another course, namely, that the cost of repairs sufficient to enable the ship to proceed on her voyage with the cargo would exceed the value of the ship when so repaired. The fact that the damage was such as to make the vessel a constructive total loss will not relieve the underwriters of liability. He referred to *Scottish Marine Insurance Co. of Glasgow* v. *Turner* (1), *Jackson* v. *Union Marine Insurance Co., Ld.* (2), *Assicurazioni Generali* v. *S.S. Bessie Morris Co., Ld.* (3), *Roura and Forgas* v. *Townend* (4), *Petros M. Nomikos, Ld.* v. *Robertson* (5), *Kulukundis* v. *Norwich Union Fire Insurance*

(1) (1853) 1 Macq. 334.

(2) (1874) L. R. 10 C. P. 125.

(3) [1892] 2 Q. B. 652.

(4) [1919] 1 K. B. 189.

(5) [1938] 2 K. B. 603; (on app.) sub nom. *Robertson* v. *Petros M. Nomikos* [1939] A. C. 371.

Society (1), *Reischer* v. *Borwick* (2), and *Carras* v. *London and Scottish Assurance Corporation.* (3)

Sir Robert Aske K.C. (*A. J. Hodgson* with him) for the defendant. The special clause may seem a peculiar one to put into a policy such as this, but it originated from the era of scuttling after the last war and is designed to limit the liability of underwriters. In all cases where there is only a partial loss of freight, or where there is a total loss, actual or constructive, of freight, but not a total loss, actual or constructive, of the ship, the power of recovery remains. The commercial purpose is to ensure that where there is a total loss of the ship the assured shall recover the value of the vessel, but with nothing added for loss of freight. It is all a matter of bargaining and is reflected in the premium. It is contended for the plaintiff that the clause only applies where it is necessary for the assured to prove a total or constructive total loss of the ship. That is not what the clause says. The words are: "In the event of total loss . . . . of vessel . . . ." That is the event on which the clause becomes operative. Where the cost of repairs sufficient to enable the ship to complete her voyage exceeds her repaired value the assured is unable under the policy to recover for a total loss of freight. As to what constitutes constructive total loss of ship see *Manchester Ship Canal Co.* v. *Horlock.* (4) There may be loss of freight without a constructive total loss of the ship, but if there is damage to the ship by a peril insured against amounting to a constructive total loss, the assured cannot recover under this policy, because the loss of freight arises from the same damage. In *Robertson* v. *Petros M. Nomikos* (5), both the Court of Appeal and House of Lords held that there was a loss of freight from constructive total loss of ship where there was a constructive total loss of ship plus a loss of freight. The contention that loss of freight does not arise from constructive total loss except where the ship is in ballast finds no support in the authorities. The plaintiff says that there are two causes of loss of freight—constructive total loss, and perils of the sea, that the defendant has only protected himself against the former, and that the loss must arise solely from the excepted cause—constructive total loss of the ship—if the defendant is to get the benefit of the exception. The true view is that there are not two causes but one cause. Peril of the sea and damage to ship are the two elements which are the foundation of any conclusion on either constructive total loss of ship or loss of freight.

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(1) [1937] 1 K. B. 1.
(2) [1894] 2 Q. B. 548.
(3) [1936] 1 K. B. 291.
(4) [1914] 2 Ch. 199, 209.
(5) [1939] A. C. 371.

He also referred to *Carras* v. *London and Scottish Insurance Corporation* (1), and *Rankin* v. *Potter.* (2)

Cyril Miller replied.

Cur. adv. vult.

1940. May 1. ATKINSON J. read a judgment in which he stated the facts, and continued: The points of claim, therefore, contain an allegation of a loss of freight based on the impossibility of repair so as to complete the voyage with the cargo, and an alternative allegation of a constructive total loss of freight based on the commercial impossibility of repair sufficient to complete the voyage with the cargo. There has been, however, no agreement as to why or how the ship became a constructive total loss. I am left in doubt whether the ship was a constructive total loss because it was reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because the cost of repairing the damage would have exceeded the value of the ship when repaired. It may be that the ship was impossible of repair, either permanently or for the completion of the voyage with her cargo of timber, the most buoyant of cargoes, and in that event the question of the cost of repair would not arise. On the other hand, it may be that the ship was repairable, but that the cost was prohibitive both for the purposes of s. 60 of the Marine Insurance Act, and as alleged in the statement of claim. I do not think that this procedure is very appropriate where so much is left in doubt and when the Court must express a view on hypothetical sets of facts, a view which does not determine the action but leaves it still to be tried.

(1) [1936] 1 K. B. 291, 299, 303.

(2) (1873) L. R. 6 H. L. 83, 99.

The argument has mainly turned on the effect of two recent cases in the Court of Appeal dealing with commercial loss of freight, and I have a suspicion that both sides know or suspect that it will turn out that the ship was repairable, but at a prohibitive expense. The question of law is as to the meaning and effect of the exception in the freight policy relied on in the defence. The policy covers freight valued at 3000*l.*, and then there is this typewritten clause: "subject to the Institute Time "Clauses (Freight) as attached hereto." It will be remembered that clause 5 of those Time Clauses is: "In the event of the "total loss, whether absolute or constructive, of the steamer, "the amount underwritten by this policy shall be paid in full, "whether the steamer be fully or only partly loaded or in "ballast, chartered or unchartered," and clause 6 is: "In "ascertaining whether the vessel is a constructive total loss "the insured value in the policies on ship shall be taken as "the repaired value, and nothing in respect of the damaged "or break-up value of the vessel or wreck shall be taken "into account." Then the policy, having incorporated the Institute Time Clauses, says: "In the event of total "loss and/or constructive and/or arranged and/or com-"promised total loss of vessel, total loss and/or constructive "total loss of freight arising therefrom is not recoverable "hereunder."

The question is: Does the alleged loss of freight "arise "from" the constructive total loss of the ship? It is contended for the defendant that the plain intention of the parties was to exclude liability under the policy where there has been a total or a constructive total loss of ship. The underwriters, if that was their intention, had as a model a very simple clause in the Institute Time Clauses for policies on hulls which was incorporated in the hull policy under which the plaintiff was insured and reads: "In the event of total "or constructive total loss, no claim to be made by the under-"writers for freight, whether notice of abandonment has been "given or not." If they had copied that clause, a clause with which they must have been familiar, no question would have arisen, but they have chosen to incorporate the words "arising "therefrom," and it is, therefore, necessary to determine what the effect of that addition is.

In my view, if a ship becomes a total loss and the owner cannot perform his contract of carriage, his loss of freight is consequential on the loss of the ship and arises therefrom. If a ship is properly abandoned as a constructive total loss on account of the actual loss appearing to be unavoidable, repair being physically impossible, again, in my view, any loss of freight is consequential on that constructive total loss of the ship and may fairly be said to arise therefrom. Such a loss of ship is not necessarily followed by loss of freight. The disaster may happen so close to the port of discharge that the cargo may be saved, but, if there is a loss of freight in such circumstances, I think it does arise from the constructive total loss of the ship. So, too, if the owner loses possession of the ship as by capture by an enemy and it is unlikely that he can recover it. Loss of freight is consequential on and arises from such a loss as, for example, in *Roura and Forgas* v. *Townend.* (1)

But what is the position if a ship becomes a constructive total loss because, although repair is physically possible, the cost would exceed the value of the ship when so repaired, and the ship is, therefore, abandoned to her underwriters and the freight is not in fact earned ? Can it be said that the loss of freight is consequential on or arises from that constructive total loss ? In the two recent cases referred to of *Carras* v. *London and Scottish Assurance Corporation, Ld.* (2), and *Kulukundis* v. *Norwich Union Fire Insurance Society* (3), the Court of Appeal has made it quite clear that the question of commercial loss of freight depends on whether the charter-party under which it was to be earned was destroyed by perils of the sea. It is, in truth, a question arising as between the shipowner and the freighter and is an entirely different question from the question of the commercial loss of the ship as between the shipowner and the hull underwriter. In the latter case commercial loss is established if it is proved that the cost of the complete repair of the ship, making no allowance for any general average contribution, is greater than the repaired value. Very often the insured value is taken as the repaired value. The Institute Time Clauses so provide and they are incorporated in the plaintiff's policy on the hull. By agreement any sum can be fixed in advance as the repaired value. The test may thus be very artificial. As between shipowner and underwriter of freight the question depends on whether the shipowner is excused as between himself and the freighter from the performance of his contract of carriage. His obligation, primarily, is to perform that contract and carry the cargo to its destination. It is only if he can establish a commercial loss which will excuse him from the performance of the obligation as between him and the freighter that he can claim on his freight policy. The rule as to when a commercial loss is established as between owner and freighter is not the same rule, nor is it a branch of the same rule, as that which applies as between owner and hull underwriter: *Kulukundis* v. *Norwich Union Fire Insurance Society*, per Greene L.J. (1) Loss of freight is established on proof that the cost of temporary repairs to the vessel sufficient to enable her to carry her cargo to its destination, less the estimated general average contribution to be made by the cargo, would have exceeded the repaired value of the ship.

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(1) [1919] 1 K. B. 189.
(2) [1936] 1 K. B. 291.
(3) [1937] 1 K. B. 1.

Three matters of difference at least emerge between the tests of commercial loss for the purpose of establishing constructive total loss of vessel and commercial loss for the purpose of establishing loss of freight. In the one case it is the cost of permanent repair without allowing for general average contribution, compared with a repaired value which may be artificial; in the other it is the cost of temporary repairs, allowing for general average contribution, as compared with the actual repaired value. In *Carras* v. *London and Scottish Assurance Corporation, Ld.* (2), the value of the ship repaired was 13,000*l.* and the agreed repaired value 45,000*l.* The cost of permanent repair exceeded 13,000*l.*, but was less than 45,000*l.* There was, therefore, no constructive total loss of ship, but the cost of temporary repairs exceeded the value of the ship so repaired and it was held that commercial loss of freight was established. Clearly, this loss did not arise from any constructive total loss of the ship, because there was none. If, however, the agreed repaired value had been the true value of 13,000*l.*, then a constructive total loss of the ship would have been established, but could that change of figure effect a change of causation of the loss of freight? In my opinion, it could not. Contrasting the two contracts, Greene L.J., in *Kulukundis* v. *Norwich Union Fire Insurance Society* (1), said: "The contract here is a totally different "contract, and there seems to be no ground in logic for assuming "that the facts, which will constitute a commercial loss for the "purposes of the one contract, are necessarily the same as "those which will constitute a commercial loss for the purposes "of the other. If there are analogies between the two cases, "they are analogies and nothing more."

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(1) [1937] 1 K. B. 1, 16. (2) [1936] 1 K. B. 291.

In my judgment, if it be the fact that the freight was lost in this case because, although the ship could have been repaired and enabled to complete the voyage, yet it would have cost more to effect such temporary repairs, allowing for general average contribution, than the repaired value of the ship, such loss did not arise from the fact, if it be the fact, that the cost of permanent repairs, allowing nothing for general average contribution, would have exceeded the repaired value. On the other hand, if the ship could not have been rendered fit to complete the voyage with her cargo of timber, I think it may fairly be said that the loss of freight did, within the meaning of this clause, arise from the fact (if it be the fact) that there was a constructive total loss of the ship in the sense that total loss appeared to be unavoidable and there was a physical impossibility of repair.

I think that answers the question which is left to me, and the result of the case will depend on what is proved.

Question answered.

Solicitors for plaintiff: *Ince, Roscoe, Wilson & Glover.*
Solicitors for defendant: *William A. Crump & Son.*

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(1) [1937] 1 K. B. 1, 17.

G. F. L. B.

SAINT LINE LIMITED *v.* RICHARDSONS, WESTGARTH & CO., LIMITED.

1940
April 25, 26, 29;
May 6.

Contract—Breach—Measure of damages—" Indirect or consequential " damages.

By a clause in a contract for the provision of engines for a ship limiting the liability of the engine builders in certain events it was provided (inter alia) " nor shall their liability ever or in "any case . . . . extend to any indirect or consequential damages "or claims whatsoever." The contract was broken by the engine builders, and the shipowners claimed damages (*a*) for loss of profit during the time they were deprived of the use of the vessel; (*b*) expenses of wages, stores, etc.; (*c*) fees paid to experts for superintendence:—

Held, that inasmuch as the damages claimed were recoverable only in so far as they were the direct and natural result of the breaches, the plaintiffs' rights were not cut down by the clause in the contract, since all these heads of damage were direct and immediate, and not " indirect or consequential."

Consultative Case stated by umpire.

By a contract in writing dated July 28, 1936, made between the claimants, The Saint Line Ld., and the respondents, Richardsons, Westgarth & Co., Ld., the respondents agreed to sell and the claimants to purchase a set of engines capable of developing 800 brake horse power at about 200 revolutions per minute. The respondents further agreed to instal those engines on the claimants' vessel *Saint Germain* and to execute certain other work on her for a total price of 7500*l.* In pursuance of the terms of the contract the claimants placed the *Saint Germain* at the disposal of the respondents on August 14, 1936. On March 28, 1938, the claimants repudiated the contract and rejected the engines as not being in accordance with the contract and they obtained other engines at an increased cost. The breach of contract was admitted.

Clause 4 of the contract provided: "Should any defect in "the material or workmanship be discovered during con-"struction or within twelve months of the trial trip and "unconnected with wear and tear or inefficiency, carelessness, "neglect or default of engineers, such parts in which the "defects are discovered will be replaced, or the defects remedied "by the engine builders at their own works or at a cost "equivalent thereto, but their liability does not extend to "any loss or damage direct or indirect caused by the failure "of such defective part or by the detention of ship, but only "to the cost of the actual replacement or remedy of the part; "and on and after the expiry of such twelve months all claims "upon, and all liability of the engine builders whatsoever, "whether in respect of any breach of any part of this contract "or of any failure to remedy defects, shall be absolutely "unenforceable and at an end, nor shall their liability "ever or in any case either before during or subsequent "to the expiration of the said period of twelve months "extend to any indirect or consequential damages or claims "whatsoever."

In spite of a number of trials the engines were never satisfactory, and no "trial trip" within the meaning of clause 4 took place. The dispute between the parties was referred to arbitration in accordance with the contract, and points of claim were delivered in which the claimants claimed damages under four heads, viz., (1.) loss of profit for the time during which they were deprived of the use of the vessel; (2.) expenses of wages, stores, etc.; (3.) superintendents' fees; and (4.) difference in cost of procuring similar engines. (This head was not contested.)

The questions for the opinion of the Court were (1.) Whether the respondents were exempted from liability for any, and, if so, which, of the classes of damage claimed in items (1.), (2.) and (3.) of the particulars by reason of the terms of clause 4 of the contract; and (2.) Whether the respondents were exempted from liability for all, or any, of the heads of expense comprised in items (2.) and (3.) by reason of the terms of clause 4 of the contract on the assumption that such heads of expense were (i.) necessarily, or (ii.) not necessarily but reasonably, incurred as a result of the respondents' admitted breaches of contract.

H. U. Willink K.C. and *Cyril Miller* for the claimants. The damages claimed are general damages for loss directly and naturally arising from the breach of contract by the defendants, and clause 4 does not protect them. In the Oxford English Dictionary the term "consequential" is defined as "of the "nature of a consequence merely; not direct or immediate; "eventual." In *Millar's Machinery Co., Ld.* v. *David Way & Son* (1) the Court of Appeal clearly regarded "consequential" damages as those which were not the direct and natural result of the breach. Clause 4, so far as it applies here, protects the defendants only from liability for "indirect or "consequential" damage.

The twelve months period of limitation in clause 4 does not apply, because there never was a successful trial trip, which was the event from which the period was to run. Thus, clause 4 is only to be considered in so far as it excludes certain kinds of damage which we are not claiming. It does not deal with non-performance, or lateness in delivery. The damages here claimed—replacement of parts, loss of profit, expenses of wages and stores, and fees paid for superintendence—are direct and immediate, and, therefore, not consequential and they can be recovered by the claimants.

A. T. Miller K.C. and *J. P. Ashworth* for the respondents. The claim for damages here cannot be taken out of clause 4 merely by saying that the damage is general and not special. Thus, loss of profit is an impossible claim, being consequential damage. The contract here records the sale of an existing chattel, and after twelve months claims are to be at an end. In *Millar's Machinery Co., Ld.* v. *David Way & Son* (1) the sum recovered was direct damage on a consideration which failed. All other damage was ruled out. In the present case the applicants can only recover under clause 4 for the replaced parts of the machine. That is the only "immediate" damage suffered by them, the other being remote in point of time and, therefore, consequential. At common law damages can be recovered whether (i.) directly or immediately resulting, or (ii.) consequential. Clause 4 is intended to exclude the latter branch. It cannot be directed to damage which is

(1) (1935) 40 Com. Cas. 204, 210.

too remote at common law. In *Gordon Alison & Co., Ld.* v. *Wallsend Slipway Co., Ld.* (1), the plaintiff recovered damages which were, in effect, loss of profit, and they did so because the exceptions clause was not incorporated in the contract.

H. U. Willink K.C. replied.

1940. May 6. ATKINSON J. (After summarising the terms of the contract and reading clause 4) : The question is : How far is clause 4 an answer to the claim ? The maintenance period of 12 months was to date obviously from a successful trial trip, a trip which prima facie satisfied the claimants. It is common ground that that trip was never made.

It is necessary to appreciate what damages would be recoverable apart from that clause. All the damages are claimed as general damages, no special circumstances are relied on, and the damages recoverable would be without doubt the loss directly and naturally resulting in the ordinary course of events from the breach or breaches of the contract. It is to be observed that there are here at least two breaches. There is the failure to deliver at all and there is the breach based on delay, depriving the owners of the use of this ship for about 2½ years. In so far as the damages claimed do not come within that description, the claimants will fail.

The question, therefore, is directed to the effect of clause 4 upon damages which ex necessitate come within that description, damages which result directly and naturally, apart from special circumstances, from the breach or breaches alleged. The three headings, loss of profit, expense thrown away, and moneys spent on superintendence as a result of these breaches, may all be recoverable within that general rule. It will be for the arbitrator to determine whether and to what extent they are recoverable within that rule. I imagine he will be sure to say that the profit lost and expenses incurred before the expiration of a reasonable time for performance are not damages arising from any breach. Mr. Willink, I gather, conceded that.

(1) (1926) Unrep.; see 26 Ll. List 159, 164.

In determining whether the clause is a defence to these claims for damages it must be remembered that where a contracting party seeks to protect himself from liability for damages recoverable by law for breach of contract he must do so in clear and unambiguous language. This clause divides itself into three parts. The first part, which relates to defective material or workmanship during construction, has no relevance to this case, but it is not unimportant because there I find the words: " their liability does not extend to any loss or damage "direct or indirect." Therefore, the clause, on the face of it, recognises the distinction between direct damage and indirect damage. The second part of the clause relates to what is to happen after the expiry of the 12 months from the trial trip, and there there is a complete bar to all claims for damages. But the relevant part of the clause is the third part, and one finds quite different language used, namely, that the liability is not to extend to any indirect or consequential damages. So one part of the clause recognises the difference between direct and indirect damages, a second part declines liability for any damage of any kind, and the third part excludes indirect or consequential damage.

What does one mean by "direct damage" ? Direct damage is that which flows naturally from the breach without other intervening cause and independently of special circumstances, while indirect damage does not so flow. The breach certainly has brought it about, but only because of some supervening event or some special circumstances. The word " consequential " is not very illuminating, as all damage is in a sense consequential, but there is a definition in the Oxford English Dictionary to which both sides have appealed: " Of the "nature, of a consequence, merely ; not direct or immediate ; "eventual." It cites the definition of "consequential "damages" from Wharton as: " losses or injuries which "follow an act, but are not direct or immediate upon it." But, apart from that, I have the guidance of the Court of Appeal as to what is meant by " consequential." In *Millar's Machinery Company, Ld.* v. *David Way & Son* (1), where the Court was

(1) 40 Com. Cas. 204, 210.

construing a clause of the same class as this, I find this that Maugham L.J. said: "On the question of damages the word "'consequential' has come to mean 'not direct'." Roche L.J. agreed "that the damages recovered by the defendants "on the counterclaim were not merely 'consequential' but "resulted directly and naturally from the plaintiffs' breach of "contract." It is quite clear that the Court there took it for granted that the word "consequential" meant "merely "consequential" and referred to something which was not the direct and natural result of the breach.

In my judgment, the words "indirect or consequential" do not exclude liability for damages which are the direct and natural result of the breaches complained of. Mr. Miller, in stressing the word "consequential," sought to take advantage of the contrast with the word "immediate" in the definition in the Oxford Dictionary—"not direct or "immediate"—and he argued that "immediate" meant instantaneous, the first result in point of time, and that the only immediate damage here was the excess price which would have to be paid for the new engines. In Webster's Dictionary, the meaning of "immediate" is, "not separated by anything "intervening," and it gives as a synonym the word "direct." It merely means "flowing directly from without inter-"vening cause." I do not think "immediate" adds anything to the word "direct" and I do not think "consequential" adds anything to the word "indirect." What the clause does do is to protect the respondents from claims for special damages which would be recoverable only on proof of special circumstances and for damages contributed to by some supervening cause. I am satisfied that it does not protect them from the claims which are made in this case.

If one takes loss of profit, it is quite clear that such a claim may very well arise directly and naturally from the breach based on delay. The vessel was a trading vessel and the owners were deprived of the possession and use of the vessel for many months, and thereby of the obvious opportunity of making profit. One has only to refer to something which

Blackburn J. said in *Cory* v. *Thames Iron Works Company*.(1) That was a case raising the question what damages were recoverable where some machinery was delivered late. Blackburn J. says in the course of the argument: "Now, in the "present case, the breach of contract was the non-delivery "at the agreed time of a hull capable of being used as a hulk "for storing coals, and the consequences that would naturally "arise from such non-delivery of it would be that the purchaser "would not be able to earn money by its use, and this loss of "profit during the delay would be the measure of the damages "caused by the non-delivery." *Wilson* v. *General Iron Screw Colliery Co.* (2) is another case which would seem really to leave no doubt about that part of the claim, but it will be for the arbitrator to determine how far the damages claimed here are recoverable. All I am asked to say is whether this clause is a bar to such a claim. My reply to that is that it is no bar assuming these damages are properly recoverable under the general law.

The next heading relates to money thrown away. Again, I do not gather that I am asked to advise the arbitrator how far those damages are recoverable, but on the assumption that they are prima facie recoverable, again I say that this clause has no bearing. As to the many items dealing with wages, one finds an illustration in *Waters* v. *Towers* (3) where there was a breach of contract to fit certain machinery and there was great delay. There were two claims. One was for the loss of the value of the services of apprentices who had to be paid. That was held to be recoverable, and the loss of profits which would have been earned were also recovered. Expenses thrown away may well be recoverable under the general law, and if so they would not be affected by this clause.

The third class of damage is as to 700*l.* paid to superintendents. Again it will be for the arbitrator to say whether those fees were properly incurred, whether that damage flowed reasonably from the breach. If it did, I do not think it is touched by this clause.

(1) (1868) L. R. 3 Q. B. 181, 189.
(2) (1877) 47 L. J. (Q. B.) 239.
(3) (1853) 8 Ex. 401.

1940

SAINT LINE LD.
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Atkinson J.

The second question which I am asked is not quite so clear. In my view, expenses are recoverable "if they are fair and "proper under the circumstances." I am quoting from Mayne on Damages, 10th ed., p. 17. I dare say there must be some element of necessity to make it fair to incur the expenditure. I imagine that reasonable business necessity is as good a guide as any other. When once it is established that an expense is recoverable as part of the damages directly and naturally flowing from the breach because it was reasonable and proper in the circumstances, then I answer that this clause does not exclude it, and a fortiori if it was a necessary expense. The more necessary it is the easier it is for the claimants to establish that it is a direct and natural result of the breach. The nearer they can approximate to a case of necessity the better for them. I do not gather that I am asked to say what degree of necessity is necessary. No arbitrator can ask a judge to deliver a treatise on the law of damages. So all I say is that, assuming the expenses are sufficiently reasonably incurred to be recoverable by the general law, this clause does not cut down the claimants' right to recover them. I think I have answered the questions sufficiently.

Questions answered.

Solicitors for claimants: *Stokes & Mitcalfe.*

Solicitors for respondents: *Middleton, Lewis & Clarke, agents for Middleton & Co., Sunderland.*

J. W. H.

WELD-BLUNDELL AND OTHERS v. SYNOTT.

1940
April 3, 29.

Mistake—Mistake of fact—Payment under mistake—Accounts between first and second mortgagees on sale of property—Accountant's error—Duty to account—Whether mistake inter partes—Recovery—Estoppel.

The plaintiffs and the defendant were first and second mortgagees respectively of the same property. The mortgagor having made default, the plaintiffs sold the security and collected the proceeds. Having satisfied their own debt, they accounted to the defendant for the debt and interest due to him and in so doing overpaid him to the extent of 112*l.* 10*s.* On the plaintiffs claiming to recover this sum as money paid under a mistake of fact, the defendant set up in defence (1.) that as the mistake was between the plaintiffs and the mortgagor and not between the plaintiffs and himself, the money was not recoverable; and (2.) that the plaintiffs were estopped by their representations to the defendant:—

Held, as to (1.) that, even if the mistake was originally between the plaintiffs and the mortgagor, it was also inter partes, and entitled the plaintiffs to recover; and, as to (2.), that no estoppel arose, for there was no neglect on the plaintiff's part, and, as first mortgagees, they were not under any duty at their peril to inform the defendant correctly of the true state of the account.

Skyring v. *Greenwood* (1825) 4 B. & C. 281, and *Holt* v. *Markham* [1923] 1 K. B. 504, distinguished.

ACTION tried by Asquith J.

This action was begun by specially indorsed writ, the claim being for the recovery of 112*l.* 10*s.*, money paid under a mistake of fact. The following statement of facts (which were not in dispute) is taken from the judgment: The plaintiffs were at all material times first mortgagees of certain property of which the defendant was the second mortgagee. The mortgagor having defaulted, the plaintiffs exercised their power of sale. The proceeds of sale amounted to 6595*l.* 2*s.* 8*d.* net. The plaintiffs were entitled, as first mortgagees, to retain out of this fund what was due to them, namely, 6000*l.* as principal and 293*l.* 17*s.* 7*d.* as interest, that is 6293*l.* 17*s.* 7*d.* in all. They were, therefore, bound to account to the defendant, to whom as second mortgagee 500*l.* plus interest was due, for the balance, that is, 301*l.* 5*s.* 1*d.*

The plaintiffs, by mistake, presented to the defendant an account showing 413*l.* 15*s.* 1*d.* as due to him, and later they paid him that sum. That was because, through a miscalculation on the part of an accountant, the plaintiffs had retained for themselves, under the head of "interest," not the full 293*l.* 17*s.* 7*d.* to which they were entitled, but only 181*l.* 7*s.* 7*d.* They, therefore, overpaid the defendant 112*l.* 10*s.*, and they sought to recover that excess as money paid under a mistake of fact.

The defendant disputed on the pleadings, but conceded at the hearing, that the plaintiffs were entitled to 6000*l.* principal and 293*l.* 17*s.* 7*d.* interest on their mortgage. He did not admit that any part of that sum was paid to the defendant under such a mistake of fact as would entitle the plaintiffs to repayment. Alternatively, he contended that if the mistake was of the character which justified the claim for repayment, the plaintiffs were estopped from claiming the return of the amount overpaid, because they misled him into the belief that the larger sum was due to him, and in various ways by their misrepresentation induced him to alter his position.

The events leading up to the litigation were as follows:—In December, 1934, the plaintiffs lent to a Mrs. Gouldman 6000*l.* at 5 per cent. interest on a first mortgage of freehold property belonging to her. Later, the defendant lent the same lady 500*l.* on a second mortgage of the same property. The defendant had guaranteed her overdraft with the Midland Bank up to 500*l.* and took his second charge on her property as security for this liability. Mrs. Gouldman defaulted as against the plaintiffs, who got a receiver appointed. On June 24, 1938, the plaintiffs caused the mortgaged property to be sold. On July 21, the plaintiffs, by their solicitors, forwarded to the defendant's solicitor a statement purporting to show how the purchase money had been dealt with and the balance remaining. This statement had been compiled by an accountant employed by the plaintiffs, or by the receiver whom the plaintiffs had put in. It showed the gross proceeds of sale at 7004*l.* 14*s.* 10*d.*, the principal due to the plaintiffs as first mortgagees as 6000*l.*, and the interest due to the plaintiffs as 181*l.* 7*s.* 7*d.* Deducting these items plus the charges of the receiver, auctioneer and solicitors, the statement showed a balance of 420*l*. 19*s*. 3*d*. as the balance to be handed over to the defendant as second mortgagee, less certain legal charges not yet ascertained. The figure of 181*l*. 7*s*. 7*d*., as interest due to the plaintiffs was in fact wrong, the accountant's assistant having failed to include in the interest defaulted on an instalment of interest due on June 7, 1937, which amounted (minus tax) to 112*l*. 10*s*. The balance, therefore, shown on the statement as payable to the defendant should have been 112*l*. 10*s*. less than it appeared to be on the face of the statement.

Correspondence followed in September and October between the plaintiffs' solicitors and the defendant, in the course of which the solicitors practically declined payment of the balance due to the defendant until the defendant had paid off Mrs. Gouldman's overdraft with the Midland Bank in accordance with his guarantee. On November 10 the bank informed the plaintiffs' solicitors that that had been done. The defendant, who had earlier paid the bank 100*l*., thereupon paid a further sum of 416*l*. 12*s*. 9*d*. and the guarantee was cancelled. To pay this further sum the defendant had to raise or increase his overdraft with his own bank, Lloyds Bank, by that amount. On November 30 the plaintiffs' solicitors sent a statement showing the final balance due to the defendant, that is, the 420*l*. 19*s*. 3*d*. previously mentioned, less 7*l*. 4*s*. 2*d*., the figure at which the legal costs to be deducted had been ascertained. The final balance was therefore shown at 413*l*. 15*s*. 1*d*., and on December 1, the defendant signed a receipt for that sum. By December 12 the plaintiffs had discovered the accountant's error of 112*l*. 10*s*. and wrote demanding repayment of this amount as overpaid. On January 6, 1939, the defendant's solicitors, on his behalf, refused that demand, pointing out (inter alia) that the defendant, in reliance on the plaintiffs' assurance that 420*l*. odd less legal costs was coming to him, had borrowed 416*l*. odd from his bankers and had paid off Mrs. Gouldman's overdraft with the Midland Bank in accordance with his guarantee, and that he had done so on the insistence of the plaintiffs' solicitors. On February 3 the plaintiffs issued the writ in the present action claiming repayment of the 112*l.* 10*s.* as paid under a mistake of fact.

W. H. Moresby for the plaintiffs. The money was here paid under the influence of a mistake of fact and it is "against conscience for the defendant to retain it": per Parke B. in *Kelly* v. *Solari.* (1) In *Skyring* v. *Greenwood* (2) the plaintiffs were precluded from recovering only because they had a duty to acquaint the defendant with the amount of his income, and on the strength of credits given him the defendant had altered his position for the worse. *Holt* v. *Markham* (3) is distinguishable, there being there a mistake of law. Moreover, the long delay had misled the defendants, and the plaintiffs as bankers owed a duty to the defendants to be accurate. No such additional duty rested on the plaintiffs here.

F. Hallis for the defendant. This case is distinct from *Kelly* v. *Solari* (1) because the defendant has not received the money without title, he being the second mortgagee. The only mistake was regarding the amount due on the mortgage, and as to this the facts resemble the over-payment on a cheque by a banker: *Chambers* v. *Miller* (4) in which *Kelly* v. *Solari* (1) was distinguished. To succeed the plaintiffs must show, first, that the retention of the money would be unconscionable, and, secondly, that the mistake was one of fact between payer and payee. This was illustrated in *Deutsche Bank* (*London Agency*) v. *Beriro and Co.* (5) and *Aiken* v. *Short.* (6) The mistake here was not between the plaintiffs and defendant, but between the plaintiffs and the mortgagor. Secondly, as to an estoppel, the plaintiffs were in the position of trustees for the defendant: *Thorne* v. *Heard and Marsh* (7), and they owed a duty to him to render accounts with reasonable care. They told the defendant, "pay "off the mortgagor's bank overdraft and we will pay you."

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(1) (1841) 9 M. & W. 54.
(2) (1825) 4 B. & C. 281.
(3) [1923] 1 K. B. 504.
(4) (1862) 13 C. B. (N. S.) 125; 32 L. J. (C. P.) 30.
(5) (1895) 1 Com. Cas. 123, 255; 73 L. T. 669.
(6) (1856) 25 L. J. (Ex.) 321.
(7) [1895] A. C. 495.

The defendant acted on their representation and altered his position by raising money to pay off the overdraft. [He also referred to *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (1)]

W. H. Moresby in reply. The plaintiffs are only trustees to pay the proper balance to the defendant, and the duty to account rests on both parties. The defendant had no title here. The fact that there was a previous mistake by the plaintiffs' accountant as to the mortgagor's indebtedness to the plaintiffs does not affect the subsequent mistake between the plaintiffs and the defendant. As regards the alleged estoppel, the defendant has not altered his position to his detriment and that is a necessary ingredient: opinion of Lord Tomlin in *Greenwood* v. *Martins Bank* (2) and Halsbury's Laws of England, 2nd ed., vol. xiii., "Estoppel," para. 547 et seq., where the essential factors giving rise to estoppel in pais are set out.

Cur. adv. vult.

1940. April 29. ASQUITH J. read a judgment which, after stating the above facts, was as follows: The defendant sets up two pleas, first, that the money, though paid by mistake, was not paid under such a mistake of fact as to be recoverable, and, secondly and alternatively, that the plaintiffs, having misled the defendant into the belief that the sum paid and no less was due to him, and he having altered his position on the faith of that representation, the plaintiffs are estopped from demanding repayment.

I will deal with these defences in turn. As to the first, the defendant's main contention was that the mistake was not a mistake as between the plaintiffs and the defendant, but a mistake as between the plaintiffs as first mortgagees and the mortgagor, because it concerned the amount due to the plaintiffs from the mortgagor as interest, and that this was a mistake with which the defendant had nothing to do. Against *Kelly* v. *Solari* (3) and similar cases, defendant relied on authorities such as *Chambers* v. *Miller* (1), *Aiken* v. *Short* (2), and *Deutsche Bank* (*London Agency*) v. *Beriro and Co.* (3), as deciding that, if money is to be recoverable as paid under a mistake of fact, the mistake must have been one as between the plaintiff and the defendant, between the payer and the payee.

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(1) [1926] A. C. 670, 693.

(2) [1933] A. C. 51.

(3) 9 M. & W. 54.

I have found some difficulty in apprehending the exact meaning of the words "as between" in this connection. It is notoriously difficult to harmonize all the cases dealing with payment of money under a mistake of fact, but the ground on which, in *Chambers* v. *Miller* (1), it was said that the mistake was not one between the parties was that it did not affect the liability as between the payer and the payee: i.e., that it was not such a mistake that, if the mistaken assumption of the payer had been true, there would have been a legal right in the payee to demand, and a legal obligation in the payer to pay, the money in question. More concretely, if the bank's customer in that case had had in his account assets sufficient to meet the cheque, as the bank wrongly supposed he had at the time when it paid, there would still have been no legal right in the payee to demand payment from the bank, whereas in *Kelly* v. *Solari* (4), where the mistake was presumably held to be a mistake between the payer and the payee, or otherwise the plaintiff could not have recovered, the mistake was one which did affect liability as between them. If the life policy of the deceased man had still been valid, as the payer mistakenly imagined, he would have been bound to pay the insurance moneys to the executrix of the deceased man. In *Aiken* v. *Short* (2) the plaintiff failed to recover the money, and here again, although the Court did not refer under that name to the distinction between mistakes which are between the parties and mistakes which are not, Bramwell B. in his judgment seems to have had this distinction in mind when he says that to make the money recoverable the mistake must be as to a fact which, if true, would have made it obligatory on the payer to pay the payee,

(1) 32 L. J. (C. P.) 30.
(2) 25 L. J. (Ex.) 321.
(3) 1 Com. Cas. 123; 73 L. T. 669.
(4) 9 M. & W. 54.

and that it is not enough if it is merely a mistake as to a fact which, if true, would make it desirable for the payer to make the payment.

When a mistake is of the first class, one affecting obligation, I think it is between the parties. It is perhaps not easy at first sight to square this conclusion with such cases as the *Deutsche Bank (London Agency)* v. *Beriro and Co.* (1), but, as Lord Sumner says in *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2), that case was decided on the basis of a contractual duty owed by the payer to the payee. Whether there is such a comparable duty in the present case I will consider in a moment when dealing with estoppel. Apart from that, there is much in Lord Sumner's judgment in that case to support the view which I have expressed as to the meaning of a mistake between the parties. For instance he says (3): "They," that is, R. E. Jones, Ld., "issued it," the cheque for 5000*l.*, "to discharge "their obligation, and there being no obligation in fact, the "money was paid to Waring and Gillow, Ld., under a mistake "of fact, a mistake arising directly between these two "companies." The only basis on which it has been argued that in the present case the mistake is not of this character is that it was or arose from a mistake as to what the mortgagor owed the plaintiffs, and therefore was a mistake between the mortgagor and the plaintiffs, and not between the plaintiffs and the defendant. I cannot see why it should not be both. Where what A. owes to B. depends on what A. is owed by C., and A., owing to a mistake as to the latter amount, automatically makes a mistake as to the former amount, there is, in my view, a mistake not only as between A. and C., but as between A. and B. as well. I, therefore, hold that the defence that the mistake was not inter partes fails.

I now come to the second defence, estoppel. Assuming that there is, as I have held, a mistake of fact entitling the plaintiffs prima facie to recover, are they estopped from recovering? It is argued for the defendant that there was

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(1) 73 L. T. 669.

(2) [1926] A. C. 670.

(3) [1926] A. C. 670, 691.

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WELD-BLUNDELL v. SYNOTT.

Asquith J.

here a representation of fact by the plaintiffs acted on by the defendant to his detriment. The account showing 420*l*. 19*s*. 3*d*., minus a certain unascertained deduction for costs, is relied on as a representation, and the act of the defendant in paying off the mortgagor's overdraft by raising or increasing an overdraft of his own is relied on as an act done to his detriment in reliance on this representation. Then again it is said that there was a second representation consisting in the actual payment to the defendant, on December 1, of 413*l*. 15*s*. 1*d*., to the effect that that amount and no less was due. I am not sure what act, following this second representation, was relied on as an alteration of the defendant's position, but I think reliance was placed on his omission to sue the mortgagor on her personal covenant between December 1 and December 12, when the defendant was undeceived.

As to the first representation, I do not think it was definite or unequivocal. "I owe you 420*l*. less a deduction of an "unknown amount" is very vague, nor is it clear that by paying off the sum which the defendant had guaranteed and which he would have to pay off sooner or later, the defendant was incurring any net detriment. He may have paid earlier than he would otherwise have, but as against that he would save interest.

As to the second representation, it is not established that, but for it, the defendant would have sued the mortgagor between December 1 and 12, or that if he had, he would have reaped any benefit by doing so then, or again that he could not have done so thereafter if there was anything to be gained by such an action. But I will consider the position on the assumption that I am wrong on both these points. Assume then that, contrary to my view, there was a sufficient representation and a sufficient acting on it to the representee's detriment, even on that assumption I do not think an estoppel arises unless it can be shown that there was neglect or misconduct on the plaintiffs' part in making the misrepresentation.

When the decisions as to estoppel in connection with payment of money under a mistake of fact are closely examined, much seems to turn on whether the payer was subject to a duty as against the payee to inform him of the true state of the account—in effect, a duty not to make a mistake of fact in that regard. In *Skyring* v. *Greenwood* (1) an army paymaster, the plaintiff, was held to owe a major in the army, the defendant, such a duty. He misinformed and overpaid the defendant. The defendant was held entitled to assume that the plaintiff had performed his duty and, having spent the money overpaid, on this assumption he was held not liable to refund it to the plaintiff. So again in *Holt* v. *Markham* (2), a very similar case, the Court of Appeal by a majority decided that the mistake was one of law, Scrutton L.J. not committing himself on this issue, but all three Lords Justices agreed that, if it was a mistake of fact, the plaintiff was estopped. The payer there was under a duty to the payee almost exactly similar to that in *Skyring* v. *Greenwood.* (1) In *Deutsche Bank* (*London Agency*) v. *Beriro and Co.* (3) the payer was under a contractual duty. In *Standish* v. *Ross* (4), a case in which there was no breach of duty or misconduct by the payer, the Court held that, where money is paid under an ordinary mistake of fact, it could not be any bar to its recovery "that the defendant had applied the money in the interval to "some purchase which he would not otherwise have made, "and so could not be placed in statu quo."

Is there any such duty in the present case on the payer as to raise an estoppel? Undoubtedly a first mortgagee who sells the mortgaged property and collects the full proceeds is under some duty to encumbrancers who rank after him. That duty is to hold the balance of the proceeds after satisfying his own debt in trust for those encumbrancers, but I do not think there is on him an additional duty comparable to that of the army paymasters in the two cases I have cited, at his peril to inform the second mortgagee correctly of the true state of the account. The duty under this head does not, in my view, exceed that of an ordinary trustee who would not be estopped in similar circumstances. It is true, and I have not overlooked the argument, that in this case the accounts as between the first mortgagee and the mortgagor were exclusively within the knowledge of the first mortgagee, as between him and the defendant, but so they may equally be in the case of an ordinary trustee. One can easily imagine a case in which exclusive knowledge, or means of knowledge, of the amount due to the cestui que trust resided in the trustee. There would not in that case be an estoppel, nor, by parity of reasoning, should there be in this.

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(1) 4 B. & C. 281.

(2) [1923] 1 K. B. 504.

(3) 73 L. T. 669.

(4) (1849) 3 Ex. 527, 534.

The result is that there must be judgment for the plaintiffs for 112*l.* 10*s.*

Judgment for plaintiffs.

Solicitors for plaintiffs: *Church, Rendell, Bird & Co., for Taylor, Kirkman and Mainprice, Manchester.*

Solicitors for defendant: *Barfield, Child, Barry, Lucas & Sons.*

F. P. F.

OLDS DISCOUNT COMPANY, LIMITED *v.* KRETT AND ANOTHER.

1940
April 26.

Hire purchase—Sale of goods by dealer to finance company—Hire-purchase agreement—Default by hirer—Goods retaken by dealer on company's behalf—Sale by dealer to innocent third party—Claim by finance company—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 1.

The plaintiffs purchased goods from G., who then, as their agent, let the goods on hire purchase to F. F. defaulted, and G. retook possession of the goods. He subsequently sold the goods to the defendants. The defendants took them in good faith and without notice of the sale to the plaintiffs, who had not, at the date of the second sale, completed the payment of the purchase price. The plaintiffs claimed the return of the goods and damages for their detention:—

Held, that the defendants were not protected by s. 25, sub-s. 1, of the Sale of Goods Act, 1893, since G. was in possession of the goods at the date of the second sale not as the original seller to the plaintiffs but under an implied mandate from them to recover the goods from a defaulting hirer and hold them as bailee.

Staffs Motor Guarantee, Ld. v. *British Wagon Co., Ld.* [1934] 2 K. B. 305 followed.

SHORT CAUSE tried before Stable J.

The plaintiffs, Olds Discount Co., Ld., whose business consisted in financing hire-purchase transactions, claimed from the defendants, Miss Yetta Krett and her father, Samuel Krett, the return of certain specific articles of furniture, and damages for their detention. It was admitted that the defendants had purchased the goods claimed in good faith and without notice of the plaintiffs' claim from a furniture dealer named Goldstein, and the only question calling for a report arose on a defence set up under s. 25, sub-s. 1, of the Sale of Goods Act, 1893. (1)

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(1) By the Sale of Goods Act, 1893, s. 25, sub-s. 1: "Where a "person having sold goods con- "tinues or is in possession of the "goods, ... the delivery or "transfer by that person, or by a "mercantile agent acting for him, "of the goods . . . . under any "sale . . . . . . to any person "receiving the same in good faith "and without notice of the pre- "vious sale, shall have the same "effect as if the person making "the delivery or transfer were "expressly authorized by the "owner of the goods to make the "same."

By an agreement in writing dated June 23, 1939, between the plaintiffs and Goldstein, it was agreed that whenever Goldstein could negotiate a hire-purchase agreement acceptable to the plaintiffs the plaintiffs would purchase the goods from him and would authorize him to let them on hire purchase on their behalf. By clauses 4 and 5 of that agreement, it was provided that before entering into a hire-purchase agreement on behalf of the plaintiffs, Goldstein should execute a sales letter addressed to them, which should constitute a binding sale to the plaintiffs of the goods comprised therein, and the property in those goods should forthwith pass to the plaintiffs absolutely. Goldstein thereupon was to be entitled to sign the hire-purchase agreement on behalf of the company and deliver the goods to the hirer. Provision was made for the guarantee by Goldstein of payments from the hirer and for the acceptance by him of bills of exchange as security for those payments. Clause 13 provided: "If a hirer elects to "terminate his agreement in accordance with the terms "thereof and returns the goods comprised therein or whenever "possession of any goods comprised in such agreement is "resumed by the company or by the agent [Goldstein] on its "behalf, the said goods shall remain the property of the "company and shall be dealt with as directed by the company, "and the liability of the company for payment of the balance "of the purchase price shall remain unaffected thereby."

On July 13, 1939, Goldstein, as agent for the plaintiffs, entered into a hire-purchase agreement, whereby the goods in question in the present action were let to Morris Frankenstein, and a sales letter of the same date was duly sent to the plaintiffs, who thereupon became the purchasers of the goods. Frankenstein having fallen into arrears, in November, 1939, Goldstein retook possession of the goods, which remained in his possession. In January, 1940, a representative of the plaintiffs brought a customer named Roberts to inspect the goods, and on January 19, 1940, by their solicitor, the plaintiffs demanded delivery of the goods by Goldstein to Roberts. The goods were not delivered to Roberts and they remained in Goldstein's shop, where, on February 1, 1940, the defendants purchased them. In answer to the plaintiff's claim, they relied (inter alia) on s. 25, sub-s. 1, of the Sale of Goods Act, 1893.

Sylvester Gates for the plaintiffs.

W. A. L. Raeburn for the defendants.

The arguments of counsel sufficiently appear from the judgment.

STABLE J. [after dealing with the facts:] As regards the defence under s. 25 of the Sale of Goods Act, 1893, I am satisfied that I am precluded by authority from deciding in the defendants' favour. The section provides that where a person having sold goods continues or is in possession of the goods, the transfer of those goods under a sale to a person receiving them in good faith and without notice of a previous sale, shall give a good title. Taken in their widest sense the words are wide enough to protect the defendants, and, I confess, it causes me some regret to have to decide in favour of a finance company which for a matter of over two months left these goods in the possession of a furniture dealer without taking any steps to see that they were not disposed of again, but I think the matter is covered by *Staffs Motor Guarantee, Ld.* v. *British Wagon Co., Ld.* (1) There a finance company bought property from a dealer with the object of putting through a particular hire-purchase transaction, but that transaction fell to the ground. The finance company consequently entered into a fresh contract with the person from whom the goods had been purchased, hiring back their property to him, and while he was in possession of the goods under that entirely independent contract he disposed of them to an innocent third person. MacKinnon J. held that that innocent person was not protected by the section.

There is a distinction between that case and this, because there the possession by the vendor of the goods was derived from a transaction which was not contemplated by anyone at the time the original contract for sale was made. In the

(1) [1934] 2 K. B. 305.

present case, although the possession by Mr. Goldstein on and before February 1 was not one which he obtained by virtue of any right contained in the initial transaction with the plaintiffs, or by virtue of any obligation imposed on him by that initial transaction, there is to be derived from the course of dealing taken together with the documents an implied mandate to him to look after his principals' interests and get the furniture back if the hirer was hopelessly in default. So the resumption of the possession here was not quite such an independent matter as it was in the case before MacKinnon J. That distinction, however, seems to me to be a distinction without a difference, because what MacKinnon J. decided was that the possession referred to in the section must arise out of the fact that the person who has got possession was the seller of the goods.

In the present case, when Goldstein sold the goods to the plaintiffs the goods passed out of his possession as seller completely and into that of Frankenstein, who had hired the goods from the purchasers, the plaintiffs. The possession which Goldstein held up to January 19 arose out of a mandate from the plaintiffs simply to act as their agent and to hold the property as their bailee. It was a mere accident that the agent to whom that mandate was given happened to be the person by whom the goods had originally been sold. It is plain that after January 19, or at latest January 22, Goldstein had no right to remain in possession of the goods. The bailment of goods to him as agent was determined, and as from January 22 at the latest (on which date he should have delivered the goods to Roberts) he was in possession of the goods under no shadow of a claim of right, and most certainly not by virtue of the fact that he at one time or another had sold them to the plaintiffs.

That being so, it seems to me that the point is exactly covered by the principle in *Staffs Motor Guarantee, Ld.* v. *British Wagon Co., Ld.*, in which MacKinnon J. said (1), citing a judgment of Stout C.J. in New Zealand: " 'It is " 'contended by Mr. Levi that these words mean that if

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(1) [1934] 2 K. B. 305, 315.

" ' the seller of the goods delivers them to a buyer and the " ' buyer accepts them, and afterwards the seller gets them " ' back on a new contract in the nature of a bailment, the " ' seller can sell the goods to a third person and give a good " ' title to them, provided the third person acts bona fide in " ' the transaction. In my opinion that is not the meaning " ' of the section. The meaning is—first, that if a person " ' sells goods and continues in possession, even though he " ' has made a valid contract of sale, provided that he has not " ' delivered them, he may to a bona fide buyer make a good " ' title; and, secondly, the putting-in of the words " or is " ' "in possession of the goods" was meant to apply to a " ' case of this character: If a vendor had not the goods " ' when he sold them, but they came into his possession " ' afterwards, then he would have possession of the goods, " ' and if he sold them to a bona fide purchaser he could make " ' a good title to them. He would be in the same position " ' as if he had continued in possession of the goods when he " ' made his first sale. In such a case as that he could make " ' a good title to a bona fide purchaser. That is not this " ' case. In this case the person who sold the goods gave up " ' possession of them, and gave delivery of them to the " ' buyer.' " That is the present case. " ' The relationship, " ' therefore, of buyer and seller between them was at an " ' end. It is true that the seller got possession of the goods " ' again, but not as a seller. He got the goods the second " ' time as the bailee of the buyer, and as the bailee he had " ' no warrant, in my opinion, to sell the goods again, nor " ' could he make a good title to them to even a bona fide " ' purchaser.' " MacKinnon J. goes on to say: "I think "that that reasoning is sound, that the same principle ought "to apply under the words of the identical provision of the "English Act, and that the decision in that case applies to "the facts of this case," and he expresses the same regret that I have felt for the innocent people who have been defrauded by the irregular transactions of the dealer.

There is one matter to which I ought to allude. Mr. Raeburn emphasized the fact that in the present case the relationship

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OLDS DISCOUNT CO. v. KRETT.

Stable J.

of buyer and seller is still, as it were, alive, because the plaintiffs, who bought the goods, have not completed the payment for them, because that obligation has not at the moment matured. That is right, but it is plain that Goldstein could not assert any unpaid vendor's lien on these goods against the plaintiffs. His lien went the moment he made delivery of the goods to the person who hired them from the plaintiff company. The relationship of buyer and seller still exists only to the extent that the plaintiffs bought the goods from Goldstein, and the due date for the payment of the balance of the purchase price has not yet come. But when one looks, as one should, at the question of possession, it is plain that the possession here is derived from a bailment which is wholly distinct and independent from the relationship of buyer and seller.

In the result, with, as I say, considerable regret, I must hold that the claim succeeds and there will be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Sidney Pearlman.*
Solicitor for defendants: *W. Timothy Donovan.*

J. W. H.

JOHNSTON *v.* CHARLES OSENTON & COMPANY.

[1939. J. No. 2359.]

C. A.
1940
April 8, 15.

Practice—Reference—Official referee—Order of judge referring action to —Case involving prolonged examination of documents or scientific or local investigation—Case also involving question of negligence by professional persons—Discretion of judge—Appeal to Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 89 (*b*)—*Administration of Justice Act,* 1932 (22 & 23 *Geo.* 5, *c.* 55), *s.* 1, *sub-s.* 1.

Under a contract between the plaintiff, who was the owner of certain land, and the defendants, a firm of estate agents and surveyors, the defendants undertook to prepare a scheme for the laying out of the land as a housing estate; and the defendants accordingly proceeded with the work. The plaintiff brought an action against the defendants claiming damages for alleged breach of their duty under the contract in having acted negligently and without regard to the plaintiff's interests, inasmuch as they had failed to advise as to proper levels for drainage, had suggested an inappropriate method of drainage, had mismanaged the negotiations with the local authority as to drainage, had delayed the scheme of development, had failed to plan for the right number and values of the houses on the estate, and had arranged to lay out a defective system of drainage; and the defendants denied all these allegations. On the application of the plaintiff the Master, having these issues and all other relevant considerations before him, made an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, that the action should be tried before an official referee on the grounds that it required a prolonged examination of documents and a scientific and local investigation which could not conveniently be conducted by the Court through its ordinary officers; and the judge in Chambers having the same matters before him made an order affirming the order of the Master on the same grounds. On appeal:—

Held, by the Court of Appeal (Slesser L.J. and Singleton J., Clauson L.J. dissenting) that the judge in his discretion was entitled to make the order on the materials before him, notwithstanding that they included these considerations, namely: that the defendants, in order that their intended disproof of the allegations of negligence made against them might receive as wide publicity as possible, were desirous that the action should be tried in the High Court rather than in the court of the official referee; and that by virtue of the Administration of Justice Act, 1932, s. 1, sub-s. 1, there was now no appeal from the decision of an official referee on an issue of fact.

Evans v. *Bartlam* [1937] A. C. 473, principles applied.

Hoch v. *Boor* (1880) 43 L. T. 425; and *Sacker* v. *Ragozine & Co.* (1881) 44 L. T. 308 followed.

C. A.
1940

JOHNSTON
v.
CHARLES
OSENTON
& Co.

APPEAL from an order of Tucker J.

Mr. A. B. Johnston (hereinafter called "the plaintiff") having on March 24, 1936, contracted to purchase a property known as "Tilehouse estate," in the borough of Guildford, and having on April 13, 1937, contracted to purchase an adjoining property known as the "Stoughton Farm estate," made an agreement with Messrs. Charles Osenton & Company (hereinafter called "the defendants"), a firm of estate agents and surveyors at Guildford, under which he gave instructions to the defendants to prepare a scheme for the lay-out of the said estates, and the defendants accepted those instructions, and thereafter until about May, 1938, proceeded with the development of the said properties.

On October 23, 1939, the plaintiff brought the present action against the defendants, claiming damages for breach of contract and negligence.

In his statement of claim the plaintiff alleged (para. 3) that in the circumstances it was the duty of the defendants to act with due skill and diligence, to make all proper inquiries and obtain all necessary information, and to take all necessary steps to forward the interests of the plaintiff in and about the development of the properties; and that alternatively it was an implied term of the said instructions that the defendants should carry out the same in accordance with the duty above referred to; (para. 4) that in breach of that duty and/or implied term the defendants acted negligently and without sufficient or any regard to the plaintiff's interests, and that by way of particulars the plaintiff would rely on the facts and matters hereinafter in paras. 5 to 14 set out; (para. 5) that for the purpose of preparing a scheme for the lay-out of the property as a housing estate it was necessary, or alternatively the recognised and usual practice, to obtain forthwith a complete grid of levels of the property; that in particular the levels were required for the purpose of considering and preparing a system of drainage for the property; that, notwithstanding the fact that the defendants received instructions as aforesaid in March, 1936, they failed to obtain a complete or any grid of levels of the properties or either of them until some date after the month of May, 1937; (para. 6) that on July 10, 1936, the defendants submitted to the town clerk of Guildford a plan of the proposed lay-out of the Tilehouse estate, and on or about August 13, 1936, a further plan, together with a request for an interim development order under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933; that the said plan was disapproved by the borough council of Guildford upon the ground that main drainage was not available and notice of the disapproval was given to the defendants by letter from the town clerk dated September 30, 1936; that notice of appeal against the disapproval was lodged with the Ministry of Health on October 20, 1936; that on the same date the plaintiff supplied the defendants with a report from Messrs. Burns Brothers (London), Limited, wherein a proposal was made for discharging sewage from the estate into a public sewer or sewers situate near the estate by means of a pumping plant; and that the defendants failed to pay any or any sufficient regard to that proposal or to consider sufficiently or at all whether cesspool drainage could be avoided by means of the said or a similar proposal; (para. 7) that the appeal was accordingly prosecuted by the plaintiff in accordance with the defendants' advice and was allowed on December 30, 1936, and an interim development order was issued on January 27, 1937; and that the plaintiff on many occasions verbally informed the defendants of his desire to proceed promptly with the development of the estates, but the defendants failed until August, 1937, to submit the requisite plans to the borough council of Guildford for their approval; (para. 8) that by reason of the defendants' failure to consider properly or at all the possibility of installing a system of main drainage by means of pumping plant and by reason of their continued recommendation of a scheme of cesspool drainage the plaintiff was compelled to enter into an agreement dated November 11, 1937, with the borough of Guildford, which provided (inter alia) (i.) that pending provision of main drainage the plaintiff should deposit a sum of 8*l.* upon the sale of each plot of land shown on the plan annexed to the said agreement; (ii.) that in the event of cesspool drainage being provided for any of the plots in respect whereof the sum of 8*l.* should have been paid, a sum of 3*l.* should be repaid to the plaintiff upon main drainage being provided; (iii.) that after provision of main drainage the plaintiff should pay to the council a sum of 8*l.* upon the sale of each further plot of land shown on the plan; (iv.) that within five years from the date of the agreement the council should provide a main outfall sewer at a specified place and at such a depth as would effectively drain the sewers on the Tilehouse estate; (para. 9) that as a result of the matters hereinbefore set out completion of the purchase of the Tilehouse estate was postponed from October 5, 1936, the date fixed by the contract, until July 1, 1937; that further, the completion of the purchase of the Stoughton Farm estate was postponed until February 15, 1938; and that if the defendants had produced proper plans for the development of the estates neither of the postponements would have occurred; (para. 10) that the plans prepared by the defendants for the purpose of constructing sewers on the estates provided for a soil sewer to be laid beneath a road described on the plans as "Road G"; that the said plans were prepared without any or sufficient regard to the levels of the land included in the estates, and the proposed soil sewer would not have been capable of receiving sewage from a large number of houses to be erected on the estate; and that further if the proposed soil sewer had been constructed in accordance with the plans, a sewer proposed to be connected therewith for the purpose of receiving sewage from houses constructed along a road marked C on the plans could not in fact have been constructed at all; (para. 11) that as the defendants were at all material times well aware, it was in the plaintiff's interest and his express wish that construction of houses on the estates should be begun as soon as possible; that at all material times there was available a sewer situate within a distance not exceeding 45 feet from the southernmost boundary of the Tilehouse estate, which sewer was capable of receiving drainage from 75 houses or thereabouts; and that the defendants failed to make any provision for using the said sewer and the aforesaid plans for the lay-out and drainage of the estate were prepared without any regard to the existence thereof; (para. 12) that on many occasions the plaintiff emphasized verbally to the defendants the importance of preparing the scheme for the lay-out of the estates in such a manner as to secure the greatest number of houses thereon; that the number of houses per acre permitted for the estates was twelve; that the defendants failed to provide for the erection of houses of the density aforesaid or any sufficient density; that in particular in respect of an area comprising nineteen acres and known as the Saffron Platt area the number of houses erected in accordance with the defendants' plans was 175, whereas that area was sufficient for the erection of 228 houses; that further the total number of plots in the estate proposed in accordance with the defendants' plans submitted in August, 1937, was 781, which number was increased in November, 1937, to 872; and that in fact the estates were sufficient to comprise 1140 plots or thereabouts, or, alternatively, if 5¾ acres forming part of the estates are reserved for shops, cinemas, or church sites, 1071 plots or thereabouts; (para. 13) that by notice dated September 1, 1937, the defendants were informed by the borough surveyor of Guildford that approval had been given by the borough council to a plan deposited by the defendants for the proposed lay-out of new roads and sewers on the Tilehouse estate; that the said approval was expressly made subject to the sizes of surface water sewers and piping of ditches being to the borough surveyor's satisfaction; and that the defendants failed to make any or sufficient inquiry as to the borough surveyor's requirements, and by letter dated September 8, 1937, instructed Messrs. Franks Harris Brothers, Ld., to proceed with the laying (inter alia) of surface water sewers; and that thereafter the borough surveyor refused to approve of the size of the sewers and it became necessary to remove so many thereof as had already been laid; (para. 14) that the aforesaid requirements of the borough surveyor had regard (inter alia) to the fact that surface water had prior to the plaintiff's purchase been drained or discharged on to the estates from

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land situate on the western side of a highway known as Worplesdon Road adjoining the said estates; that there was not at any material time any easement or right in the owner or occupier of that land or in any other person or body to cause the surface water to be drained or discharged on to the estates; and that the defendants failed to make any or sufficient inquiries as to the circumstances in which the surface water was so drained or discharged, or to make any or sufficient endeavour to procure an alteration of the requirements of the borough surveyor; and (para. 15) that by reason of the premises the development of the estates was seriously prejudiced and delayed and the plaintiff had suffered damage; that but for the defendants' breach of duty as aforesaid it was estimated that an additional five hundred houses or thereabouts could already have been erected and sold; that further the agreement referred to in para. 8 hereof and the payments thereunder could have been avoided; that the plaintiff's costs of and in connection with the appeal to the Ministry of Health could have been avoided; that the cost of laying and removing the sewers referred to in para. 13 hereof amounted to 230*l*. or thereabouts; and that further the plaintiff had paid to the defendants a sum of 341*l*. 5*s*. 0*d*. in respect of the services alleged to have been rendered by them in connection with the estates, which said sum was in the premises money thrown away.

The defendants denied that they had been in any way unskilful or negligent.

On behalf of the plaintiff, the view was taken that an application should be made for an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, that the action should be tried before an official referee, on the ground that it required a prolonged examination of documents or a scientific or local investigation.

On January 17, 1940, a summons was accordingly taken out on behalf of the plaintiff, asking (inter alia) for such an order.

On February 5, 1940, the Master made an order that the action should be referred to the official referee.

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The defendants gave notice of appeal, dated February 6, 1940, that the action should be tried by a judge.

On February 13, 1940, Tucker J. made an order dismissing the defendants' appeal from the Master.

The defendants gave notice of appeal dated February 27, 1940, to the Court of Appeal. The appeal was heard on April 8.

Gilbert Beyfus K.C. and *Montague Berryman* for the defendants, appellants.

The order of Tucker J. referring the action to be tried by the official referee was wrongly made and should be set aside. The learned judge had no jurisdiction to make the order. He had no jurisdiction to make it apart from the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*), and he had no jurisdiction to make it under that provision as the action is not one requiring any prolonged examination of documents or any scientific or local investigation which cannot conveniently be conducted by the Court through its ordinary channels. If the judge had jurisdiction to make the order, he ought not in his discretion to have made it because any examination of documents or scientific or local investigation which the case required could be conveniently conducted by the Court in the ordinary way. Since 1930 various cases to which catchment boards have been parties, though they involved much technical detail, have been tried in the High Court and not referred. An action raising questions of account will only be referred where it is clear that these questions cannot conveniently be tried in the usual manner: see *Knight* v. *Coales*. (1)

[SLESSER L.J. The Court of Appeal will not normally interfere with the exercise of a judge's discretion: *Evans* v. *Bartlam*. (2)]

In that case Lord Atkin (3) and Lord Wright (4) dissented from the view that the Court of Appeal has no power to interfere with a judge's exercise of discretion unless

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(1) (1887) 19 Q. B. D. 296.

(2) [1937] A. C. 473.

(3) Ibid. 480.

(4) Ibid. 486.

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they think that he acted upon some wrong principle of law. There are moreover special reasons here why the judge in his discretion should not have made the order. In this case allegations of negligence are made against the defendants affecting their professional and business reputation, which allegations the defendants are desirous of repudiating and disproving, and it is desirable that such a case should be tried in the High Court rather than in the court of the official referee as the former Court is more largely attended by members of the public than the latter. Further, by virtue of the Administration of Justice Act, 1932, s. 1, sub-s. 1, there is now no appeal from the decision of an official receiver on an issue of fact; and an order ought not therefore to be made which leaves the appraisement of the reputation of a party to an individual official of the Court whose findings cannot be questioned.

[SLESSER L.J. It has been held that the order of a judge referring an action in which there are accounts to be investigated should not be interfered with, notwithstanding that the action involves charges of fraud: *Hoch* v. *Boor* (1), or of misconduct and negligence: *Sacker* v. *Ragozine & Co.* (2)]

These cases were decided before the Act of 1932 had abolished appeals from an official receiver on questions of fact; and each of them involved a very prolonged examination of accounts. Where the Court of Appeal is satisfied that the order of the judge is wrong, it may in its discretion set it aside.

J. P. Ashworth for the plaintiff, respondent. The order of the learned judge referring the action for trial by an official referee was rightly made. Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*), the judge had a discretion to say whether or not the action was one requiring a prolonged examination of documents or a scientific or local investigation which could not conveniently be conducted by the Court in the ordinary way and should therefore be sent for trial before an official referee. There was here ample material on which the judge could exercise his discretion in favour of sending the action to the court of reference. The action requires the

(1) 43 L. T. 425.

(2) 44 L. T. 308.

consideration of plans and other documents and raises many issues of a technical character, relating to the lay-out of the property as a building estate, the number of houses which should be built upon it, and the system to be adopted and installed for draining it. It is desirable that the tribunal trying this case should have a view of the locality, and that could more easily be had by an official referee than by a judge of the High Court. It was within the discretion of the judge to make the order notwithstanding that the case is one in which the defendants are desirous of answering in a public court the allegations of negligence that are made against them. The court of the official referee is one to which the public have free access. Further, the discretion of the judge to make the order is in no way limited or interfered with by s. 1, sub-s. 1 (*b*), of the Administration of Justice Act, 1932, which provides in effect that there shall be no appeal against a decision of the official receiver on a question of fact. The discretion of a judge referring an action, such as this, which requires a prolonged examination of documents and a scientific and local investigation will not be interfered with by the Court of Appeal except in a very strong case: *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1); and in no case should the Court of Appeal interfere with the discretion of a judge acting within his jurisdiction unless it is clearly satisfied that he was wrong: per Lord Wright in *Evans* v. *Bartlam.* (2) The present case has already been before two tribunals, namely, the Master and the judge in Chambers, each of which had all the facts before it including the desire of the defendants to preserve their right of appeal on issues of fact, yet each of these tribunals in its discretion referred the case to the official referee. It is provided by R. S. C., Order XXXVI., r. 7 (*a*), that a cause tried by a judge without a jury may at any time be sent to be tried by an official or a special referee. Leave is not required to enable a party to appeal from the decision of a special referee.

Gilbert Beyfus K.C. in reply. Where fraud is charged and the person charged claims a public investigation, and does not consent to a reference, the Court will as a rule refuse to force

(1) (1882) 8 Q. B. D. 664.

(2) [1937] A. C. 473, 486.

him to it: *Russell* v. *Russell* (1): and the same rule should be applied where negligence and want of skill is imputed to professional persons.

SLESSER L.J. In this case the plaintiff has applied to the Master for an order that the action be referred to an official referee. The Master made an order accordingly; and on appeal the learned judge affirmed his decision. This is an appeal by the defendants from the order of the judge.

The defendants carry on business as estate agents and surveyors; and, according to the statement of claim, on March 24, 1936, the plaintiff agreed with them to buy a property known as the Tilehouse estate, Guildford, and instructed the defendants to prepare a scheme for the lay-out of the property as a housing estate; in May, 1938, they were entrusted by the plaintiff with the development of the Tilehouse estate and also of another property known as the Stoughton Farm estate, which the plaintiff had agreed to buy on April 13, 1937.

The complaint is made that in discharging the various obligations which they undertook in the development of the properties the defendants were negligent in various ways, namely, generally, that the defendants failed to advise as to proper levels for drainage, suggesting an inappropriate method of drainage, or mismanaged the negotiations with the local authority as to drainage, delayed the whole scheme of development, failed to plan for the right values of the houses on the estate and arranged to lay out a defective system of drainage.

[His Lordship read paras. 5 to 15 of the statement of claim, and continued:]

The matters complained of in the statement of claim substantially are traversed in the defence; save that in para. 5 the defendants admit that the plan submitted by them to the town clerk was disapproved of by the borough council of Guildford "upon the ground (inter alia) that main drainage was "not available."

The Master and the learned judge were of opinion that

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(1) (1880) 14 Ch. D. 471.

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the case fell within s. 89, sub-s. 1 (*b*), of the Supreme Court of Judicature (Consolidation) Act, 1925, which, in substance, replaces s. 14 of the Arbitration Act, 1889; and came to the conclusion that the cause required a prolonged examination of documents or scientific or local investigation which could not, in the opinion of the Court, conveniently be made before a jury, or conducted by the Court through its ordinary officers.

This appears to be an order, prima facie, well within the discretion of the learned judge, if there were proper material on which he could exercise it. In my view, having regard to the number of plans which may well have to be examined, and questions of a scientific nature involved in the consideration of the technique of the lay-out of the estate and of the drainage problems raised, and also the very probable need for considerable local investigation, there was ample material on which that discretion could be exercised, having regard to the issues raised in the pleadings.

The real ground for the appeal is that to make such an order in this case would be to work an injustice; and that, therefore, in accordance with the principles laid down in the case of *Evans* v. *Bartlam* (1), more particularly in the dicta of Lord Atkin (2) and Lord Wright (3), to allow this reference would result in injustice. But, as Lord Wright states (3), the Court of Appeal should not interfere with the discretion of a judge acting within his discretion unless the Court is clearly satisfied that he was wrong.

The grounds here generally relied upon are apparently these: that the defendants, being estate agents, of considerable reputation, a finding of negligence in a Court not generally frequented by the public would be very injurious; and, secondly, that in so far as by s. 1, sub-s. 1, of the Administration of Justice Act, 1932, an appeal lies only to the Court of Appeal from any decision of an official referee on a point of law, the defendants would be precluded from seeking a review of the facts upon a re-hearing which they would be entitled to ask

(1) [1937] A. C. 473.
(2) Ibid. 480.
(3) Ibid. 486.

for, were an appeal to be lodged on a finding of fact from a learned judge.

As to the second matter, I am not disposed to say that the learned judge should never have regard to the limitation of the grounds of appeal imposed by the 1932 Act; though such a consideration has never been judicially suggested as a ground for opposing remissions of actions started in the High Court to a county court. In any case this matter was argued by the respondents before him for his consideration; and I have no reason to suppose that he failed to have regard to it.

As to the more general argument that a plea of negligence should be treated as regards the question of reference as one akin to a charge of fraud, in that in the ordinary way it should not be sent to the referee, the authority of *Hoch* v. *Boor* (1) seems to me to be against the appellants' contention. That case went so far as to say that, even where there were issues involving a charge of fraud, the case might, if otherwise it were proper, be compulsorily referred, if it involved a prolonged examination of documents. Although counsel contended there, in an argument very similar to that used here, that negligence had been alleged and that, therefore, apart from fraud, character was at stake, Brett L.J. stating (2) "the "defendant says that while in his service the plaintiff mis-"conducted himself, was negligent and incompetent," none the less the Court upheld the order of the judge referring the matter to the official referee; and, though in that case the referee was to make a report to the judge, I read the judgment as of general application. Thesiger L.J. says (3): "Prima facie, "issues involving the character of the plaintiff or the defendant "in an action ought not to be referred"; but nowhere is it suggested in the judgment that a mere accusation of negligence as such raises any such prima facie presumption against reference.

This case was followed in *Sacker* v. *Ragozine & Co.* (4), where also a complaint of habitual negligence in duty as well as misconduct and disobeying orders was alleged. Denman J.

(1) 43 L. T. 425.
(2) Ibid. 426.
(3) Ibid. 427.
(4) 44 L. T. 308.

said (1): "The law as it now exists is, I think, to be found "in the case I called attention to, *Hoch* v. *Boor*." (2) In *Sacker's* case (3) Pollock B. said that the facts scarcely amounted to fraud and, the case being therefore treated on the basis of misconduct and negligence, it was nevertheless referred to an official referee.

Generally, I see no reason why, if it is to be said that the learned judge was wrong in this case, that every building contract involving accusations of negligence—and there are few which do not—in which reference was ordered, should not be appealable when the learned judge thinks fit to refer the case for other sufficient reasons to the official referee.

In my view this appeal fails.

CLAUSON L.J. By s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is enacted that in any cause or matter (other than a criminal proceeding by the Crown) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers, the Court or a judge may, at any time, order the whole cause or matter to be tried before an official referee.

In the present action the plaintiff claims (as appears from the writ and the statement of claim) damages for breach of contract and, alternatively, negligence.

The defendants are a firm of estate agents and surveyors, who were consulted as such by the plaintiff, and instructed by him to prepare a scheme for the outlay of certain properties as housing estates. The plaintiff alleges that it was the duty of the defendants to act with due skill and diligence, to make all proper inquiries and obtain all necessary information; and to take all proper steps to further the interests of the plaintiff in and about the development of the properties. The plaintiff further alleges that, in breach of that duty, the defendants acted negligently and without

(1) 44 L. T. 309.
(2) 43 L. T. 425.
(3) 44 L. T. 308.

any sufficient or any regard to the plaintiff's interests. The complaints as appearing in the pleadings may, for the present purpose, be sufficiently summarized as follows: (*a*) the defendants failed to acquaint themselves with the levels of the property, an essential preliminary to the working out of a proper system of drainage; (*b*) the defendants advised a system of cesspool drainage, and failed to consider whether cesspool drainage could be avoided by an alternative means of pumping sewage into a public sewer; (*c*) the plaintiff on this account was to his detriment forced to enter into an arrangement with the local authority in regard to temporary cesspool drainage, and the provision by the local authority at some future time and at some cost to the plaintiff of main drainage facilities; (*d*) owing to the defendants' action in regard to these matters the development scheme was delayed; (*e*) the defendants provided for laying certain sewers which either could not be laid at all or could only be laid with disadvantage to the plaintiff; (*f*) the defendants' plans did not provide, as they should have done, for securing the greatest number of houses permitted on the property by the Housing Acts; (*g*) the defendants arranged for laying certain sewers which as they knew or ought to have known would not be and were not passed by the local authority, and had ultimately to be removed; (*h*) the defendants failed to take certain steps necessary for enabling a proper system of surface drainage to be installed. The defendants' defence was, in substance, that the plaintiff knew throughout, and had indeed been informed by them, of difficulties arising or likely to arise owing to the fact that main drainage was not available; and that the defendants had not been in any way unskilful or negligent.

Those being shortly the issues raised on the pleadings, it was proposed that an order under s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, for reference of the action to an official referee should be made on the footing that the hearing would require a prolonged examination of documents or a scientific or local investigation which could not conveniently be conducted by the Court through its ordinary officers.

The pleadings were before the judge, but no evidence;

and it was suggested that he should infer from the nature of the issues that the hearing would require a prolonged examination of documents, or a scientific or local investigation which could not be conveniently conducted by the Court through its ordinary officers.

The Master took the view that it was a case for reference to an official referee; the judge after some consideration took the same view.

From the pleadings I should infer that the case would involve the consideration of detailed plans of the locus, and of lay-out and drainage plans, possibly some expert evidence as to the recognized way of dealing with such drainage problems as arose, and a careful consideration of the bearing on the matter of the rights and powers of the local authority in regard to such matters, and possibly also in regard to the Housing Acts.

Without further evidence I should, speaking for myself, be quite unable to hold that the plaintiff (who supports the order for a reference) had discharged the onus which lay on him of establishing that the action required a prolonged examination of documents or a scientific or local investigation which could not conveniently be conducted by the Court through its ordinary officers. That the action might well last several days, and would thus be likely to hamper the progress of the non-jury list, I can well believe. But, if the matter rested with me, I should be prepared to hold that the plaintiff had failed to establish the existence of the conditions required by the relevant provisions of the Act before the matter can be compulsorily referred to an official referee; and I should on that ground allow the appeal. In my view, on an application for a compulsory reference, the judge should require to be satisfied what are, generally speaking, the documents which are said to require prolonged examination, and what is the nature of and what are the reasons for the prolonged examination of documents, and the scientific or local investigation which it is suggested is of such a nature that it cannot be conducted by the Court through its ordinary officers, id est, in this case a judge trying cases in the long non-jury list. I can see no material before the Court on which the judge could properly come to a conclusion on these points. As, however, I understand that my brethren consider that the plaintiff has made out his case under this head by a mere reference to the pleadings, it becomes necessary to consider whether the judge, thus finding the action to be within the class of actions which he had power to refer, made a correct order.

If the matter now in question had arisen before s. 1 of the Administration of Justice Act, 1932, came into force, there would be no great difficulty; the effect of the order would merely be to substitute an official referee for a judge, to the manifest relief of the non-jury list. The parties would lose the services of a judge, but would have a public hearing by an experienced officer, with the same opportunities in case of error (to which all officers and even judges are liable) to have the matter reconsidered before this Court. The effect, however, of the last mentioned section is to put it out of the power of the judge to refer such a case as this to an official referee without at the same time depriving the parties of the right of appeal in case of error of fact, which they would have in the case of a trial before a judge. It is obvious that, whether this was or was not the intention of the Legislature, the position of a judge who is asked to order a compulsory reference in a case to which this section applies, is far more difficult than before the Act came into force. It is not for him a mere question of weighing up the comparative advantages of various modes of trial. He has to weigh up the advantages of a trial before an official referee, such as that of providing a continuous and (if necessary) local and possibly earlier hearing, and at the same time affording relief to a possibly overcrowded non-jury list, against the very serious circumstance that in case of error in fact on the part of the tribunal the litigants will be without remedy. It may well be that in many cases, such as that of partnership and like accounts, where the errors, if any, are unlikely to be other than errors of quantum in regard to a few among many items, the circumstance that appeal on fact is excluded may be of comparatively small importance; but the circumstance must obviously be considered and weighed.

It appears that in the present case s. 1 of the Administration of Justice Act, 1932, was mentioned to the learned judge; but, unfortunately, this Court has no information as to the reasons for his Lordship's refusal to treat the absence of a right of appeal as countervailing the advantages of a trial by an official referee.

I entirely disclaim any intention of laying down any rule as to the weight to be attached to this factor in the mind of the judge or Court which has to consider whether a case is to be compulsorily referred, with the result that there will be no appeal on error of fact.

In the present case, however, the defendant is charged with dereliction of professional duty, due it may be to incompetence, or it may be to carelessness. The issue is not even as to the incompetence or negligence of some subordinate, for which the defendants are to be held responsible. The issue is as to the personal competence, or possibly the personal conscientiousness of that one of the partners in this firm of professional men who had the business in hand. The learned judge has, whether he realized it or not, forced the defendants to submit this question of the most vital importance to the firm and individual concerned to be decided without possibility of revision on points of fact by an officer of the Court who, if I may say so with respect, is not less likely, though I will admit not more likely, to err on a matter of fact than a High Court judge; but the defendants are thus deprived of the protection, by way of appeal, against error to which they are by law entitled if the case comes before the normal tribunal of a High Court judge.

With the fullest respect for the learned judge, I am convinced that his order was erroneous, and that, if it stands, the defendants will run a serious risk of suffering what I can only describe as an injustice. There is the highest authority for the view that, with this conviction, it is my duty to refuse to concur in supporting what is, as I am satisfied, an erroneous order. Accordingly, if the matter rested with me, the appeal would be allowed, and the learned judge's order reversed.

Singleton J. The defendants are a firm of estate agents and surveyors at Guildford. The order of Tucker J., against which this appeal is brought, affirmed an order of Master Ball that the case be tried before an official referee. It is clear from the statement of claim and from the defence that there are a number of questions to be tried, both of length and of difficulty. Furthermore, it seems to me that the cause is one which involves prolonged examination of documents; and that it may well require both scientific and local investigation. I am satisfied that there were materials on which the Court or judge could come to the conclusion that the trial could not conveniently be conducted through its ordinary officers.

In such circumstances the Court or judge may at any time order the whole cause or matter . . . . to be tried before an official referee (s. 89, Supreme Court of Judicature (Consolidation) Act, 1925). It is to be observed that the word "may" is used. It is for the judge to consider the matter in all its bearings, and to exercise his discretion upon the question as to whether he should order the case to be tried before an official referee or not.

Mr. Beyfus, on behalf of the appellants, raised two points: (1.) That there was no jurisdiction to make an order that the case be referred to an official referee on the materials which were before him. As to this, I have already said that in my view there were materials on which such an order could be made. At the same time, I do not overlook the fact that judges try many cases of as complicated a nature as this appears to be. (2.) That in any event such an order ought not to be made having regard to the nature of the case, which involves various allegations against professional men; and especially so as the judgment of the official referee was final on all questions of fact since the Administration of Justice Act, 1932, s. 1. Why, said he, should a professional man, against whom charges are made which may ruin him, or his firm, be deprived of the right of appeal in this way?

I confess that this argument appeals to me. I hold the view that no litigant ought lightly to be deprived of his right of appeal; and that applies particularly in the case of a professional man against whom charges of negligence are made. At the same time, it is to be borne in mind that the Legislature, in the year 1932, thought it right to enact, and did enact, that no decision of an official referee shall be called in question by appeal or otherwise except on a point of law; and it can hardly be said that, by reason of that, no case involving charges against a professional man ought thereafter to be referred to an official referee for trial.

Mr. Ashworth submitted that the fact that there was now no right of appeal from an official referee on questions of fact had nothing to do with this appeal; that it was the duty of the Court or judge to consider whether the case fell within the words of s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925; and that, if it did, it was in the discretion of the judge to make the order independently of whether there was a right of appeal on questions of fact or not. I do not agree with this argument. I regard the cutting down of the right of appeal as one of the facts—and possibly the most important of them—which the judge must bear in mind in exercising his discretion. It was for this reason that I ventured to ask during the argument whether it was pointed out to the learned judge that the effect of upholding the order of the Master would be to deprive the appellant of any right of appeal on fact. We were informed that, both before the Master and the judge, this point was urged: that was common ground. The point then was not overlooked: it was considered by the judge (as well as earlier by the Master) before he arrived at a decision.

After hearing the matter fully argued, I feel bound to say I should not have made the order which Tucker J. made. I should have taken the view that it was on the whole undesirable to leave the defendants without any appeal on facts in a case involving many complications, even though it might appear that the case could be more conveniently tried before an official referee.

That does not mean that I am of opinion that Tucker J. is wrong. The matter was one for the exercise of his discretion. It is not one for the exercise of my discretion: unless we are clearly satisfied that the learned judge wrongly exercised his discretion, we ought not to interfere.

In *Evans* v. *Bartlam* (1) Lord Atkin said (2): " But while "the judge has such a discretion as I have mentioned, I "conceive it to be a mistake to hold, as Greer L.J. seems to "do, that the jurisdiction of the Court of Appeal on appeal from "such an order is limited so that, as the Lord Justice said, the "Court of Appeal 'have no power to interfere with his "'exercise of discretion unless we think that he acted upon "'some wrong principle of law.' Appellate jurisdiction is "always statutory: there is in the statute no restriction "upon the jurisdiction of the Court of Appeal: and while "the appellate Court in the exercise of its appellate power is "no doubt entirely justified in saying that normally it will "not interfere with the exercise of the judge's discretion "except on grounds of law, yet if it sees that on other grounds "the decision will result in injustice being done it has both "the power and the duty to remedy it." Can it be said that "the decision will result in injustice being done" if it remains? If so, clearly we ought to set the order aside. The word used by Lord Atkin is " will," not " may." I fail to see that we can dispose of the case by saying that injustice will result if the order stands. If the appellants lose in the Court of first instance and appeal to the Court of Appeal they may still lose: and if they succeed in the Court of Appeal the plaintiffs in the action may appeal to the House of Lords and may succeed. It is impossible to say that injustice *will* result by reason of the Court of first instance being final in fact in any particular case, however undesirable it may be that in an important case a litigant should be deprived of his right of appeal on fact. And one must not overlook the possibility of the defendants succeeding in the Court of first

(1) [1937] A. C. 473.

(2) Ibid. 480, 481.

instance. Indeed, trial before an official referee might turn out to be a blessing rather than otherwise—and at least the parties know after the hearing where they stand on the facts of the case; whereas there is no finality if the trial is before a judge of the King's Bench Division.

In the same case, *Evans* v. *Bartlam* (1), Lord Russell of Killowen said (2): " In the case now under discussion the judge "in Chambers thought it proper, in the exercise of his discretion, "to set aside the judgment; and unless an appellate Court "is satisfied that the discretion has been wrongly exercised "and should have been exercised in the contrary way, the "judge's order should be affirmed." Lord Wright said (3): "It is clear that the Court of Appeal should not interfere "with the discretion of a judge acting within his jurisdiction "unless the Court is clearly satisfied that he was wrong. "But the Court is not entitled simply to say that if the judge "had jurisdiction, and had all the facts before him, the Court "of Appeal cannot review his order unless he is shown to "have applied a wrong principle. The Court must if necessary "examine anew the relevant facts and circumstances in order "to exercise a discretion by way of review which may reverse "or vary the order. Otherwise in interlocutory matters the "judge might be regarded as independent of supervision. "Yet an interlocutory order of the judge may often be of "decisive importance on the final issue of the case, and one "which requires a careful examination by the Court of Appeal. "Thus, in *Gardner* v. *Jay* (4), Bowen L.J., in discussing the "discretion of the judge as regards mode of trial, says: "' That discretion, like other judicial discretions, must be "' exercised according to common sense and according to "' justice, and if there is a miscarriage in the exercise of it, it "' will be reviewed.' " And a little later: " In my opinion this "House must consider, on all the circumstances of the case, "the contentions on behalf of the respondent that the order "of Greaves-Lord J. was wrong, and that on the merits the "default judgment should not be set aside."

(1) [1937] A. C. 473.

(2) Ibid. 482.

(3) Ibid. 486, 487, 488.

(4) (1885) 29 Ch. D. 50, 58.

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Johnston v. Charles Osenton & Co.

Singleton J.

I have looked at the facts anew. I arrive at the conclusion that I should not have made the order which Tucker J. made. I am not clearly satisfied that he was wrong, though in the exercise of my discretion I should have decided in a different way. All the relevant facts were before him and he considered them: he is at least as likely to exercise his discretion properly as I am. In these circumstances I do not consider that it is the duty of this Court to interfere with the exercise of his discretion by the learned judge. It is impossible to say that he proceeded on any wrong principle; it is equally impossible to say that injustice will result from his order; and I am not prepared to say that he exercised his discretion wrongly, simply because I should have taken a different view.

If I am wrong, and if this appeal ought to be allowed solely on the ground that the appellants are by the order deprived of any appeal on questions of fact, it follows that, apart from consent, no case ought to be referred to an official referee which may affect a litigant in a sense beyond the pecuniary sense; the effect of such a practice would clearly be to cut down very considerably the number of cases with which the official referees deal. My difficulty in this case has arisen entirely through s. 1, sub-s. 1 (*b*), of the Administration of Justice Act, 1932. I can well understand the undesirability of appeals on questions of fact where accounts are being considered: there must be some finality: but I fail to see why the official referee, or an appellate Court, should not be able to give leave to appeal on a question or questions of fact in an appropriate case.

I agree that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for appellants: *Berrymans.*

Solicitors for respondent: *Gregory, Rowcliffe & Co., for Gilbert H. White & Co., Guildford.*

J. R.

HEYWOOD AND BRYETT, LIMITED *v.* A. HEYWOOD AND SON.

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1940

April 22.

Workmen's compensation—Payment of compensation by principal to workman of contractor—Right of principal to be indemnified by contractor—Principal and contractor both guilty of negligence—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 6, *sub-ss.* 1, 2.

The Workmen's Compensation Act, 1935, s. 6, provides as follows: "(1.) Where any person (in this section referred to as "the principal), in the course of or for the purposes of his trade "or business, contracts with any other person (in this section "referred to as the contractor) for the execution by or under "the contractor of the whole or any part of any work undertaken "by the principal, the principal shall be liable to pay to any "workman employed in the execution of the work any compensation under this Act which he would have been liable to "pay if that workman had been immediately employed by him; " . . . .

"(2.) Where the principal is liable to pay compensation under "this section, he shall be entitled to be indemnified by any person "who would have been liable to pay compensation to the workman "independently of this section.":—

Held, by the Court of Appeal, that where a workman immediately employed by a contractor has been injured by an accident arising out of and in the course of his employment, and the principal has paid compensation to the workman, the principal is entitled under sub-s. 2 of the above section, to be indemnified by the contractor, notwithstanding that the accident has been caused or contributed to by negligence or breach of statutory duty on the part of the principal.

Greenwood (John), Ld. v. *Hawkings* (1906) 23 Times L. R. 72, 73; and *Topping* v. *Rhind* (1904) 6 F. 666, 675, dicta dissented from.

Cory & Son, Ld. v. *France, Fenwick & Co., Ld.* [1911] 1 K. B. 114, explained and distinguished.

APPEAL from an award of Deputy-judge Forbes, West London County Court.

The facts as admitted, or found by the learned judge, were substantially as follows:—

At all material times, Messrs. A. Heywood and Bryett, Ld., a firm of builders, were erecting a building on ground belonging to them in Brentfield Road, London, N.W. They did the necessary carpentry work themselves, but they had to employ contractors for other operations including plumbing.

By a contract between themselves and Messrs. A. Heywood and Son, a firm of plumbers, which was evidenced by a written estimate orally accepted, the latter firm undertook to do the plumbing on the building and to supply the labour for that work, while the builders were to provide the material and the scaffolding which was to be used for the purpose of doing the plumbing.

An upper part of the scaffolding provided by the builders was imperfectly furnished with guards, and was not firmly fixed, being supported on a door frame which was unstable.

On July 20, 1938, a workman named Albert Edward Taylor, employed by the firm of plumbers, was on that part of the scaffolding when it gave way and he fell and was injured.

The builders paid the injured workman compensation at the rate of 30*s*. a week.

They commenced the present proceedings in the county court against the firm of plumbers under s. 6 of the Workmen's Compensation Act, 1925, claiming to be indemnified by the latter in respect of the sum of 108*l*., being the amount of the compensation paid by them to the workman from the date of the accident to the date of the proceedings.

The learned judge was of opinion that the builders were principals, and the plumbers contractors, within the meaning of s. 6 (1); that the former firm had been guilty of both statutory and common law negligence, and that the latter firm had also been negligent; that these negligences of the parties cancelled each other; and that the builders were entitled to be indemnified; and he made an award in favour of the building firm for the sum claimed.

The firm of plumbers appealed. The appeal was heard on April 22, 1940.

F. A. Sellers K.C. and *G. C. Dare* for the appellants. The learned deputy county court judge was wrong in awarding that under s. 6, sub-s. 2, of the Workmen's Compensation Act, 1925, the respondents, as principals, were entitled to be indemnified by the appellants as contractors, for the compensation paid by them to the injured workman of the appellants. The section no doubt provides, in effect, by sub-s. 1 that the principal shall be liable to pay compensation to a workman employed by his contractor; and by sub-s. 2 that where the principal is so liable he shall be entitled to be indemnified by the contractor. It does not, however, mean that the principal is entitled to be so indemnified where the accident which caused the injury to the workman was due to his fault, e.g., his negligence or breach of statutory duty: see *Greenwood* (*John*), *Ld.* v. *Hawkings* (1); *Topping* v. *Rhind* (2); and Willis on Workmen's Compensation, 32nd ed., p. 220. Here, the evidence shows that the injury to the workman was due wholly to the negligence of the respondents, or to their breach of the statutory duty imposed upon them by the Building Regulations, 1926, regs. 1, 4 and 13, in failing to provide scaffolding which was properly constructed, safe and of sound material. The respondents having by their own fault caused the injury to the workman in respect of which they paid the compensation cannot be heard to say that they are entitled to be indemnified by the appellants. The respondents as principals are not entitled to be indemnified by the appellants as contractors because the appellants have a cross-claim against them for damages for breach of their contract express or implied with the appellants to provide safe scaffolding, for negligence, and for breach of statutory duty, and that cross-claim cancels the claim of the respondents for indemnity. Further, under s. 30, if the workman had recovered compensation from the appellants, they would have been entitled to be indemnified by the respondents (see *Mowbray* v. *Merryweather* (3)), and that right to indemnity of the appellants extinguishes the right to indemnity which the respondents are now seeking to assert. There is authority for the view that in a case falling under s. 30 a principal who has paid compensation to the workman is not entitled to be indemnified by the contractor where the accident was due to the negligence of the principal: *Topping* v. *Rhind* (2), per Lord Kinnear; and *Cory*

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(1) The provisions of the section are set out in the judgment of Slesser L.J., see post, pp. 148, 149.

(1) (1906) 23 Times L. R. 72, 73.
(2) (1904) 6 F. 666, 675.
(3) [1895] 2 Q. B. 640.

and Sons, Ld. v. *France, Fenwick & Co., Ld.* (1), and the analogy between s. 6 and s. 30 is so strong, the indemnity being the same in both cases, that the same view should be adopted in a case such as this which falls under the former section.

J. F. F. Platts Mills for the respondents. The decision of the deputy county court judge was right. Sect. 6, sub-s. 2, of the Workmen's Compensation Act, 1925, is absolute and unqualified, providing that where the principal is liable to pay compensation he shall be entitled to be indemnified by any person who would have been liable to pay compensation independently of the section. The respondents, as principals, were liable to pay, and paid, compensation to the workman, and they are therefore entitled to be indemnified by the appellants as contractors, under that sub-section, whether or not the respondents were guilty of negligence causing the accident. The observations in the cases of *Greenwood (John), Ld.* v. *Hawkings* (2), and *Topping* v. *Rhind* (3), upon which the appellants rely were made obiter and cannot be regarded as authoritative. The case of *Cory & Sons, Ld.* v. *France, Fenwick & Co., Ld.* (1), has no application to s. 6 of the Act of 1925.

Slesser L.J. In this case it has been ordered that Messrs. A. Heywood & Son, the present appellants, do pay to Messrs. Heywood and Bryett, the present respondents, the sum of 108*l.* paid by the latter as compensation for personal injury caused to one Albert Edward Taylor. The case is one which was brought under the provisions of s. 6, sub-s. 2, of the Workmen's Compensation Act, 1925, by the respondents against the appellants, the immediate employers of the workman. Sect. 6, sub-s. 1, provides: "Where any person (in this section "referred to as the principal), in the course of or for the "purposes of his trade or business, contracts with any other "person (in this section referred to as the contractor) for the "execution by or under the contractor of the whole or any "part of any work undertaken by the principal, the principal "shall be liable to pay to any workman employed in the

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(1) [1911] 1 K. B. 114.
(2) 23 Times L.R. 72.
(3) 6 F. 666, 675.

"execution of the work any compensation under this Act "which he would have been liable to pay if that workman "had been immediately employed by him; and where compensation is claimed from or proceedings are taken against "the principal, then, in the application of this Act, references "to the principal shall be substituted for references to the "employer." In the circumstances of this case the learned judge has come to the conclusion that the respondents here were principals within the meaning of s. 6, sub-s. 1, and that the appellants were contractors, and it is clear that that is so.

The facts of the case so far as are material are these. [His Lordship stated the facts, and continued:] The learned judge has come to the conclusion that in the imperfect provision of guards to this scaffolding and in the failure of the respondents, the principals, to fix the structure firmly, referring particularly to a door frame which stood erect and was unstable and gave way, although it appears to have been used as a part of the scaffolding, the respondents were guilty of a breach of reg. 13 of the Building Regulations, 1926 (1), made under the Factory and Workshop Act, 1901, which provides that "Where "a scaffold has not been erected by or under the superintendence of the employer whose workmen are to use it, the "said employer, before allowing work to proceed thereon, ". . . . shall satisfy himself . . . . that the scaffolding is "in a stable condition, and that the materials used in its "construction are sound, and that the required safeguards "are in position." I think he has also come to the conclusion that the builders were negligent in the way in which they provided this defective scaffolding; but none the less he has come to the conclusion that they are entitled to the indemnity which they seek, though he says he regrets it. The reason apparently which has moved him to come to that conclusion is that, though he thought the builders as principals would not be entitled to their indemnity by reason of the fact that they were guilty of a statutory breach of regulations, or were negligent, he was of opinion that the appellants also were negligent and that the two negligences cancelled one another out and, therefore, in the result the appellants could not rely upon the alleged negligence of the respondents. I mention that, because, in my judgment, the learned judge was quite wrong in the conclusion to which he came in assuming, in the first place, that the negligence of the respondents, which he has found, would in itself disentitle them to their indemnity, and although I have come to the conclusion, for reasons which I will explain, that this appeal fails, yet it is for reasons quite other than those which are stated by the learned judge in his judgment. Of course, I assume the facts to be as he has found them and there is no question that there was evidence on which he could find these facts.

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(1) 1926, No. 738.

In my opinion this case turns entirely on a proper consideration of sub-s. 2 of s. 6, sub-s. 1 of which I have read. As I have said, under sub-s. 1 it is clear that in the circumstances of this case Messrs. Heywood and Bryett, Ld., the respondents, were principals, and Messrs. Heywood & Son, the appellants, were contractors. In those circumstances the injured workman was entitled not only to seek compensation, as he would have been apart altogether from this section, from the contractors, his immediate employers, but was also entitled to seek compensation from the principals and, as I have said, he did in fact recover compensation from them to the extent of 108*l.* Sub-s. 1 of s. 6 is a provision for the advantage of the workman, giving him a right to obtain compensation from somebody who is not the employer but who is to be deemed the employer if he satisfies the requirements of that sub-section. If he had liked he could, of course, at the outset have sued his own employers for compensation on the principle that he had met with an accident arising out of and in the course of his employment. By sub-s. 2 of s. 6 it is provided that "Where the principal is "liable to pay compensation under this section, he shall be "entitled to be indemnified by any person who would have "been liable to pay compensation to the workman inde-"pendently of this section." Those words appear to me to be absolutely clear and unambiguous and, as has frequently been stated, where the language of an Act is clear and explicit the Court must give effect to it whatever may be the consequences,

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for in that case the words of the statute speak the intention of the Legislature. I ask myself whether sub-s. 2 contains any words of limitation affecting the words "Where the principal "is liable to pay compensation under this section." I have already explained that this principal was liable by reason of sub-s. 1 and, whether the accident arising out of and in the course of the employment which created the liability to pay the compensation was caused by the negligence of the employer, by the negligence of the workman, by an accident, by an act of God or by any other means, the liability to pay compensation is exactly the same. The only qualification in the case of the workman may arise in certain cases of misconduct, which are referred to in the statute, where the disability is only partial, but so far as the employer is concerned it matters not, if the accident arose out of and in the course of the employment, whether it was due to a breach of statutory regulation or negligence, or any other cause. True it is that these matters may give rise to rights in the employer to bring actions for damages other than the duty to pay compensation, but the liability to pay compensation, if the provisions of s. 1 of the Act are satisfied, is unqualified. The employer being liable to pay compensation the sub-section goes on: "he shall be "entitled to be indemnified by any person who would have "been liable to pay compensation to the workman indepen-"dently of this section." I have already pointed out that independently of this section the appellants, Messrs. Heywood & Son, would have been liable to pay compensation to the workman and, therefore, the principal is entitled to be indemnified in the circumstances. There is nothing very startling about this provision: it is, as I have said, passed for the benefit of the workman and it merely amounts to this, that though the workman is given recourse both to the employer and to somebody else who was not the employer, at his option, if that other person satisfies the conditions of sub-s. 1, the employer, if that other person seeks indemnity, is no worse off than any other employer who is liable to a workman who recovers as a result of injury sustained by accident in his employment. That conclusion would determine this case in favour of the respondents to this appeal. They have shown that they are entitled to the indemnity within the plain language of sub-ss. 1 and 2 of this section and that on the findings of fact of the learned judge, which bring the principal and the contractor within s. 6, would put an end to this appeal.

But there are certain observations in cases which have been cited to us to which it is right that we should have regard. First there is the case of *Greenwood* (*John*), *Ld.* v. *Hawkings* (1), in which Bigham J. came to the conclusion with regard to an accident indemnity under the Workmen's Compensation Act, 1897, that the plaintiffs, who were building contractors and had employed sub-contractors, were not negligent. But he did make this observation, that he had some doubt at first whether the plaintiffs had not so far contributed to the accident by what might be called their negligence as to make it impossible for them to recover. If those observations are directed to and deal with language similar to the provisions of s. 6, sub-ss. 1 and 2, then respectfully I would point out, first that they are only obiter since the learned judge decided that the plaintiffs were not negligent. Secondly, I do not think that the contribution to the accident by negligence could make it impossible for a person availing himself of the equivalent of what is now sub-s. 2 of s. 6 to recover, but I do not regard that case as a case where Bigham J. can properly be considered to have decided any such question.

The other case which immediately deals with this subsection or its earlier equivalent is *Topping* v. *Rhind* (2), where one of the learned Lords of Session, Lord Kinnear, dealing with this matter, which again is only dealt with as obiter, said (3): "But there remains the third point which the reclaimer argued. He said that the pursuer could not recover "from his sub-contractor in this case, because the injury "caused to the workman was due to the pursuer's own fault. "I do not know if it is necessary in this case to decide that "that would be a complete answer, but there is certainly very "high authority for that view." I have been unable to find

(1) 23 Times L. R. 72.
(2) 6 F. 666.
(3) Ibid. 675.

any such high authority and the highest authority, namely, the High Court of Parliament, seems to have declared to the contrary effect. He goes on: "and as at present advised, I "cannot see that the 6th section of the statute could receive "full effect unless it had the effect maintained by the reclaimer. "If a contractor has injured one of his workmen by his own "fault, he cannot according to the argument recover an "indemnity from a sub-contractor, because the statute says "that wherever an injury is caused under circumstances "creating a legal liability against someone other than the "employer, and if compensation be paid under this Act by "the employer, the employer shall be entitled to be indemnified "by the defaulting person." The reference there to the phrase "under circumstances creating a legal liability" to pay does seem to deal, I should have thought, with words in s. 30 and not in s. 6. The language of s. 6 is, as I have already quoted, "liable "to pay to any workman . . . . compensation." But however that may be, that case, I think, can be no authority in the present case and I think the learned Lord of Session was there directing his mind, having regard to the language used, rather to s. 30 than to s. 6, though I am aware that Mr. Willis in his book on the Compensation Act seems to think that the language is directed to s. 6. In any case, as I point out, the language is not "a legal liability" but "the liability to pay compensa-"tion," which may raise a very different question.

Finally, we have been referred to the case of *Cory & Son, Ld.* v. *France, Fenwick & Co., Ld.* (1), which admittedly deals with s. 30 and not with s. 6 of the Act. I for one do not propose to embark upon the difficult question what is the ambit of s. 30 which, I think, has no direct bearing on the present case. I would, however, point out, in the first instance, that s. 30 deals with a legal liability to pay damages and it may raise all sorts of questions in regard to liability in tort and the liability of joint tortfeasors which do not arise under s. 6. It is to be observed that the provision in sub-s. 2 of s. 30: "If the workman has "recovered compensation . . . . the person by whom the com-"pensation was paid, and any person who has been called on

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(1) [1911] 1 K. B. 114.

"to pay an indemnity . . . . shall be entitled to be indemnified," is conditional upon there being a liability to pay damages and, I think, is dealing with an entirely different subject matter. This is one of the few occasions on which I have regretfully come to the conclusion that the note which is to be found in Willis on Workmen's Compensation cannot be relied upon. In the 32nd edition of that work it is stated at p. 220 that "the "contractor from whom indemnity is claimed by the principal "can successfully resist the claim on the ground that the "accident was due to the fault of the principal, e.g., his "negligence, or that of his workmen." I do not as at present advised see that there is any ground on which the contractor can refuse to pay the indemnity to the principal where the principal is liable to pay compensation under the section and has paid compensation in the cases provided for in s. 6, sub-s. 1.

I come to the conclusion, therefore, that this appeal should fail, but I dissent from the view of the learned deputy judge that it fails because both parties were guilty of negligence. In my view, the absence or presence of negligence in the case makes no difference to the unqualified operation of s. 6, sub-ss. 1 and 2.

SCOTT L.J. I agree, but venture to add a few words upon the interpretation of s. 6. The subject matter with which that section deals is the liability to pay compensation created by s. 1 of the Act and there is no underlying subject-matter except that. The section is not dealing with liability at common law either in tort on in contract. Its object is to ensure that a workman in certain cases shall be protected against the risk of his immediate employer being financially weak and, therefore, perhaps unable fully to discharge his obligation to pay compensation under the Act. In order to achieve that purpose the workman is given by Parliament a right to claim his compensation from a person described in sub-s. 1 of that section as "the principal." In relation to him the workman's own immediate employer is in law an independent contractor ; but in a popular sense the principal is, as it were, a quasi-employer

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in so far as the premises where the work is done are his and all men engaged upon work about them are doing work in his interest. The Act, therefore, taking that view, imposes upon him an obligation in law to pay the statutory compensation and a responsibility in money to make the necessary payments but, on the other hand, gives him the right to recover indemnity for those payments or the liability for those payments from the direct and in most cases smaller immediate employer with whom he has made an independent contract for the execution of some of the work. Sub-ss. 2 and 3 read together, as I think they should be, make that position quite clear. There being no reference in the section to any common law liability I see no justification for reading into sub-s. 2 any words relating to negligence either on the part of the respondent to the application or on the part of the principal who makes the application. Those notions are wholly foreign to the section which is concerned solely, as it seems to me, with compensation under the Workmen's Compensation Act. I therefore agree with the judgment pronounced by the President of the Court.

LUXMOORE L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitor for appellants: *Walter O. Stein, Woolwich.*
Solicitors for respondents: *Hewitt, Woollacott & Chown.*

J. R.

C. A.

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April 29.

ENGLISH *v.* WESTERN.

Insurance—Motor-car—Third-party liability—Exclusion of " any member " of the assured's household "—Construction.

By a policy of motor-car insurance taken out by a boy of seventeen living with, and dependent on, his father, it was provided that the underwriters should indemnify the assured against " all sums which the assured shall become liable to "pay by way of compensation for : A—*Injury to Persons.* Death "of or bodily injury to any person (including passengers) caused "by or arising out of the use of the car, but excluding . . . . "(*b*) Death or injury to any member of the assured's household "who is being carried in . . . . the car otherwise than by reason "of or in pursuance of a contract of employment." While the assured was driving the car, with his sister (who also lived with their father) as a passenger, an accident occurred in which a woman was killed and several persons, including his sister, were injured. The underwriters paid all claims arising out of the accident, except that in respect of the sister's injuries. They contended that she was a " member of the assured's household " and that any liability in respect of her claim was excluded by the clause set out above :—

Held, by the Court of Appeal (Slesser and Clauson L.JJ., Goddard L.J. dissenting) that the expression " any member in the assured's "household " in the policy was just as capable of being construed as meaning " any member of a household of which the assured "was the head " as it was of meaning " any member of the same "household of which the assured was a member," and that being ambiguous it must be construed contra proferentes, and that as the assured was not the head of a household the exception did not apply and the assurers were liable under the policy for a claim in respect of the injuries sustained by the assured's sister.

Decision of Branson J. [1940] 1 K. B. 145, reversed.

APPEAL from a decision of Branson J. (1)

The plaintiff, Jack Kenneth English, claimed in this action a declaration that he was entitled to be indemnified by the defendant, Frank Western, under an insurance policy subscribed by the defendant in respect of any compensation which the plaintiff might become legally liable to pay to George Robert English and Rita Elaine English respectively in respect of an accident which occurred on May 28, 1938, while the plaintiff was driving the motor-car insured by the policy. The parties concurred in stating the question of law

(1) [1940] 1 K. B. 145.

arising in the action in the following case for the opinion of the Court.

The defendant was one of the underwriters subscribing the "British Standard" policy and had been appointed by the underwriters to act as a representative defendant. The policy was issued in pursuance of a proposal form signed by the plaintiff and dated April 12, 1935. The period of the policy was extended from time to time, and it was a valid and subsisting contract at the material date, namely, May 28, 1938.

By cl. 5 of the policy it was provided that the underwriters should indemnify the assured against "all sums which the "assured shall become liable to pay by way of compensation "for: A—*Injury to persons.* Death of or bodily injury to "any person (including passengers) caused by or arising out "of the use of the car, but excluding . . . . (*b*) Death or injury "to any member of the assured's household who is being "carried in . . . . the car otherwise than by reason of or in "pursuance of a contract of employment."

On May 28, 1938, the plaintiff was driving his motor-car at a speed of between forty and fifty miles an hour when he came into collision with another car travelling in the opposite direction and with a third car which was travelling in the same direction as the plaintiff. As a result of the collision a woman was killed, various persons were injured and the three cars were damaged, that of the plaintiff being a total loss.

The defendant and his fellow underwriters on the "British "Standard" policy had indemnified, or had agreed to indemnify the plaintiff in respect of the loss of his car and the various third-party claims with the exception of the claim made in respect of injuries to Rita Elaine English. Rita Elaine English was being carried in the plaintiff's car otherwise than by reason of or in pursuance of a contract of employment at the time of the collision and she received personal injuries. Both the plaintiff and Rita Elaine English were the children of George Robert English, the plaintiff having been born on February 12, 1918, and Rita Elaine English having been born on August 22, 1920. At the material time both the plaintiff and Rita Elaine English permanently resided with their father. Neither of them made any contribution to the upkeep of the home, but on the contrary both were in receipt of allowances from their father.

By a writ of summons dated March 3, 1939, Rita Elaine English by George Robert English (her father and next friend) and George Robert English brought an action against the present plaintiff, Jack Kenneth English, for damages for injury caused by negligent driving. Judgment was signed in default of appearance, but the assessment of damages was postponed by agreement pending the determination of this action.

The defendant contended that he was not liable to indemnify the plaintiff in respect of any compensation which the plaintiff might become legally liable to pay to George Robert English and Rita Elaine English respectively for the personal injuries received by Rita Elaine English by reason of the operation of cl. 5 A (*b*) of the policy.

The question for the opinion of the Court was whether Rita Elaine English was a member of the assured's household within the meaning of cl. 5 A (*b*) of the policy.

Branson J. held that the expression "any member of the "assured's household" meant "any member of the same "household of which the assured was a member," not "any "member of a household of which the assured was the head," and that the assured's sister was a member of his household within the meaning of the exception, and accordingly gave judgment for the defendant.

The plaintiff appealed. The appeal was heard on April 29, 1940.

B. L. A. O'Malley (for *N. A. J. Cohen* on war service) for the appellant. The decision of Branson J. was wrong. A man who has not a household cannot be a householder. The assured when he read the policy would naturally come to the conclusion that he had no household. If he had been asked when the policy was first issued "Are you a householder ?" he must have answered "No." If asked "Where is your "household ?" his answer would have been "I have no "household ; I live in my father's household." A man's household means the household which he controls or of which he is the head. Some words are admittedly used in a wider sense. A man's club, or his college, or his Inn of Court means a society of which he is a member, not one of which he is the head. But the phrase "a man's household" is not normally so used. Under the Road Traffic Act, 1930, passengers need not be insured unless they are carried for hire or reward or under a contract of employment. The assurers in the present case, however, undertook that liability and their liability was only cut down in cases when the passengers were actually "members of the assured's household." The question is what would those words mean to an assured. An ordinary layman reading the policy would read the words "assured's "household" as meaning the household he kept or maintained. It would be straining language to construe the words "members of the assured's household" as meaning members of the same household of which the assured was a member. If there is any ambiguity as to the meaning of the policy it ought to be construed against the assurers.

[SLESSER L.J. referred to Macgillivray on Insurance Law, 2nd ed., p. 1029.]

In *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.* (1), Vaughan Williams L.J. said: "I "am of opinion, therefore, that in the case of policies of "insurance the principle that the document must be construed "'contra proferentes' strongly applies." In the same case Farwell L.J. said (2): "Where there are clear words which "prima facie import liability on the part of the company, "and it is said that their effect is cut down by a subsequent "proviso, I think we are bound to see that the terms of "the proviso are clear and not repugnant." In the present case the underwriters have undertaken liability in respect of all passengers. If they intend to cut down that liability they must do so in clear language and this they have not done. Lord Sumner also said in *Lake* v. *Simmons* (3): "The "language is the insurers' own, and in an exception it must be

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(1) [1909] 1 K. B. 591, 596.
(2) Ibid. 601.
(3) [1927] A. C. 487, 508.

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"read contra proferentes. If they intended no more than "'handed over,' they should have said so, and the more "plainly the better."

C. N. Shawcross for the respondent. The decision of Branson J. was quite correct. The appellant is trying to find an ambiguity in the policy which does not exist. In order that there shall be an ambiguity as to the meaning of a term it must be capable of more than one meaning. The word used in the policy is " household " and not " house-"holder." The term " household " does not imply a paterfamilias. It means something like a family. The meaning given to " household " in Dr. Johnson's Dictionary (ed. 1827) is " A family living together." One of the meanings given to the term in the Oxford English Dictionary is : " The "inmates of a house collectively ; an organised family including "servants or attendants, dwelling in a house." In Proverbs XXXI., 27, it is said : " She looketh well to the ways "of her household, and eateth not the bread of idleness." In those days a woman could not have been the head of "her " household. The expression " The assured or his "family " is used in cl. 9 of the policy. The word " his " does not there connote control but a member of the same family. In the same way the apostrophe " s " in the expression "assured's household " in cl. 5 connotes not control but membership of the same family. Lord Sumner said in *London and Lancashire Fire Assurance Co.* v. *Bolands, Ld.* (1) : " It "is suggested further that there is some ambiguity about the "proviso, and that under the various well known authorities, "upon the principle of reading words contra proferentes, "we ought to construe this proviso, which is in favour of the "insurance company, adversely to them. That, however, is "a principle which depends upon there being some ambiguity— "that is to say, some choice of an expression—by those who "are responsible for putting forward the clause, which leaves "one unable to decide which of two meanings is the right one. "In the present case it is a question only of construction. "There may be some difficulty, there may even be some

(1) [1924] A. C. 836, 848.

"difference of opinion, about the construction, but it is a "question quite capable of being solved by the ordinary rules "of grammar, and it appears to me that there is no ground "for saying that there is such an ambiguity as would warrant "us in reading the clause otherwise than in accordance with "its express terms." In the present case the word "household" has only one meaning, and that is a collection of people living together. Any ambiguity that arises is from confusing "household" with the word "householder" which is a different word, and imports control or dominion. That word, however, is not used in the policy. There is very good reason for putting on the words of the policy the meaning put upon them by Branson J.

B. L. A. O'Malley replied.

SLESSER L.J. This is an appeal from a decision of Branson J. upon a special case which was argued before him. The plaintiff claimed a declaration that he was entitled to be indemnified by the defendant under an insurance policy subscribed by the defendant in respect of compensation which the plaintiff might become legally liable to pay to George Robert English and Rita Elaine English in respect of an accident which occurred on May 28, 1938, while the plaintiff was driving a motor-car insured by the policy. The matter came before Branson J. on an agreed special case.

The defendant is an underwriter subscribing the policy; and the critical portion of the policy which here has to be considered is contained in cl. 5. The facts, so far as they are material, may shortly be stated thus. On May 28, 1938, the plaintiff was driving a motor-car which came into collision with another motor-car of a different make, and another car of the same make as that which he was driving. There was considerable damage done to the cars: the plaintiff's car becoming a total wreck, and a lady was unfortunately killed. The defendant, who is representing underwriters generally on the policy, and his fellow underwriters, have agreed to indemnify the plaintiff in respect of the loss of the car and various third-party claims, with the exception of a

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claim made in respect of injuries to Rita Elaine English, who was a passenger in the plaintiff's car at the time of the accident, and is his sister. They are both the children of one George Robert English. Both the plaintiff, who was at the time of the accident a very young man having been born in 1918, and his sister, who was born in 1920, lived with their father, George Robert English, at 21, Queen's Gate Place, London, and were in receipt of an allowance from him, and paid nothing towards the upkeep of the house. There was an action brought on March 3, 1939, by the sister Rita Elaine English, by her father, George Robert English, as next friend, against the plaintiff here, her brother, for damages. Judgment was signed in default of appearance ; but the assessment of the damages was postponed by agreement, pending the determination of this special case. The learned judge has held that, in construing cl. 5 of this policy which has here to be considered, the words which cause the difficulty have a very definite meaning. It is necessary in the first place to read those words and see how far one finds oneself in agreement with the learned judge as to the words having the meaning which he has ascribed to them. Clause 5 of the policy deals generally with third-party risks, and says this : " All sums which the "assured shall become legally liable to pay by way of "compensation for : *A—Injury to Persons* "—those three words are printed in large black type—" Death of or bodily "injury to any person (including passengers) caused by or "arising out of the use of the car." Stopping there, there is a liability, therefore, generally for indemnity for death or bodily injury to any person, including passengers. This lady was a passenger in the car. If the matter stood there, there could be no question but that the underwriters would be liable. The clause proceeds : " But excluding (*a*) Death "or injury arising out of and in the course of the employment "of such person by the assured." Nothing turns upon that. Then follows " (*b*)," the critical clause, " Death or injury to "any member of the assured's household who is being carried "in or upon, or entering or getting on or alighting from the "car "—the remaining words do not apply.

It is said by the underwriters that this exclusion of liability extends to the sister of the assured in this case, in that she is a member of the assured's household. On the other hand, it is said on behalf of the plaintiff: "No, this limit of "liability only applies to a member of the assured's household "where the assured himself is in a position to have or has "a household in the sense that he is a householder"—I am putting the matter compendiously—"and that as this "plaintiff was not a householder, but was living in his father's "house, supported entirely by his father, the exception "contained in (*b*) does not apply, and, therefore, the general "obligation of the underwriters to indemnify the assured in "cases where any persons including passengers have sustained "bodily injury, applies to this case."

Branson J. has come to the conclusion (1), "that the words "'member of the assured's household' mean a member of the "same household as that of which the assured is a member, "just as one speaks of a member of a man's college, or a "member of a man's club. The words are completely apt "to cover that construction. Indeed, to my mind, they seem "more apt to cover that construction than any other." Then the learned judge goes on to give reasons why the limitation has been so framed. But, in my view, it is not right to say that those words are apt to cover that construction in the sense that they are not equally apt to cover the other construction which is contended for here by the plaintiff, namely, that the assured's household refers to a person capable of having a household, namely, a householder. I think those words are equivocal. I think they are equally capable of either construction: and in the circumstances I feel that the learned judge should have considered what principles of law he ought to have applied to the construction of this policy, as no doubt he would have done had he come to the conclusion that those words were as equivocal as I think they are. If the words be equivocal or ambiguous, then I find no difficulty for myself in ascertaining what is the true principle to be applied. I think that the doctrine generally known as contra

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proferentes should here be applied. I quote from Macgillivray on Insurance Law, 2nd ed., p. 1029, where the authorities are conveniently set out: "If there is any ambiguity in the "language used in a policy, it is to be construed more strongly "against the party who prepared it, that is in the majority "of cases against the company. A policy ought to be so "framed that he who runs can read. A party who proffers "an instrument cannot be permitted to use ambiguous words "in the hope that the other side will understand them in a "particular sense, and that the Court which has to construe "them will give them a different sense, and therefore, where "the words are ambiguous they ought to be construed in that "sense in which a prudent and reasonable man on the other "side"—that is the side to whom the policy is proffered—"would understand them."

In my view, if that principle be applied, if those words be ambiguous, one arrives at this result. There is given by the opening words of clause 5 A a general indemnity to the assured in respect of passengers; and if the underwriters cannot rely upon these words in the exception as necessarily including the household in the sense which Branson J. has indicated, namely, that the assured is one member of the same household which includes his sister, then I think they are not entitled to adopt that favourable construction in order to exclude a construction which is said by the plaintiff to be the proper construction, namely, that this clause 5 A (*a*) and (*b*) has no relation to his case at all, because he was not at any material time a householder, and had not a household. The exception, therefore, must be ruled out in his case, and the general words of liability apply. That seems to me to state the principles on which the construction of an ambiguous document should be dealt with in favour of the proferee. The result is, I come to the conclusion that Branson J. was wrong, that the appeal should be allowed; and that judgment in this case should be entered for the plaintiff.

CLAUSON L.J. I need scarcely say that it is with the utmost diffidence that, in a matter which involves a question

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of the construction of a policy of insurance, I find myself differing from the judgment of Branson J. But as I have formed a reasonably clear opinion that his decision in this case is not correct, I will proceed to explain my reasons for so holding. A man may be related to a household in two ways. He may be a member of the household, or he may be the head of the household. The underwriters, while insuring the assured against his liability to passengers, except in their own favour his liability to a passenger who is a " member of the assured's "household." The question is, accordingly, whether, on the true construction of the policy, the exception covers not only the narrower class of members of a household of which the plaintiff is the head, but the wider class of members of a household of which the plaintiff is a member. Branson J. takes the view that the more natural meaning of the phrase covers the wider class, namely, members of the household of which the plaintiff is a member.

The question seems to me to be what is the relationship connoted in this phrase by the possessive pronoun which in the actual clause is concealed beneath the apostrophe " s." It appears to me that the word " his " may equally as well connote the one relation that I have stated as the other. In other words, in my judgment, either of the two competing meanings of the phrase " a member of the assured's household " is possible and natural; and, accordingly, there is in the truest sense an ambiguity in the phrase. There is no doubt that, if the phrase used in the policy is in this sense ambiguous, that meaning must be chosen which is the less favourable to the underwriters who have put forward the policy.

It may well be that one would have expected the underwriters—possibly for very good reasons—to have intended the phrase to carry the wider connotation. But that seems to me to be quite immaterial if one once reaches the conclusion that the phrase is ambiguous. If the underwriters desired the wider meaning to be placed upon it, it was their duty to make that desire clear by using unambiguous language.

For these reasons, I find myself bound to hold that the phrase of exception covers only the narrower class, the member of a household of which the plaintiff is head; and, accordingly, the case is not a case within the exception and the underwriters are liable. It follows if this view is correct, that the appeal succeeds, the judgment below is reversed, and the underwriters declared liable.

Goddard L.J. Though I regret that I am unable to share the view expressed by my Lords, I at least have the satisfaction of finding myself in agreement with the view expressed by Branson J., whose judgment in matters of insurance has always been regarded with such respect. I find his judgment so convincing that I should have been content to adopt it as my own: but I propose to add a very few words as to why I have come to a different conclusion from that at which my Lords have arrived in this Court. It is true, I agree, that the words "the assured's household," can be construed in one of two ways. It is also true to say that, where you find a proviso inserted in an insurance policy for the benefit of the underwriters you are, if the words are ambiguous or not clear, to construe those words more strongly against the underwriters than against the assured. But the doctrine generally spoken of as a construction contra proferentes is limited in this way. If there is a perfectly good reason for adopting one construction, and no reason, or very little reason, for construing the clause in the other way, the construction which affords good reason for the presence of the proviso should be preferred.

Then it seems to me that the reasons given by the learned judge are very strong for construing it in the way contended for by the underwriters. He says (1): "One can see some "reason for a limitation so framed, but it is very difficult "to follow the reason for a limitation such as that which "the assured seeks to put on the words. It is reasonable "to exclude from the benefits of a policy of this kind members "of the assured's household, giving that word a meaning "rather wider than that of 'family,' because it must be "envisaged by the underwriters that the members of a

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(1) [1940] 1 K. B. 148.

"household in that sense would probably be very frequently at "risk in the car and would, therefore, be people who, if they "were to be covered, would normally be covered only for some "additional premium." I am reminded, too, of the words of Lord Sumner in *Lake* v. *Simmons* (1): "Every one must "agree that commercial contracts are to be interpreted with "regard to the circumstances of commerce with which they "deal, the language used by those who are parties to them, "and the objects which they are intended to secure."

We are here dealing with an insurance in which the insurers are willing to give the assured an indemnity greater than that which he is obliged by statute to procure for himself—in other words, an indemnity against claims which he may have made against him on the part of passengers in his car who may be injured and say they were injured by the driver's negligence. But the underwriter is not willing to give an unlimited cover. It seems to me that the object of this proviso is to prevent the underwriters being exposed to the risk of claims by people who may be expected to be very frequent passengers in the car. To construe it in the way contended for by the assured, seems to me to lead to the curious result that if the father has a car and the son has a car, and each are insured by separate policies, the son gets a far wider cover than the father would get. I cannot think that that was intended. In my opinion, the words "the assured's household" in this policy, when one bears in mind the object with which the proviso was put in, are meant to exclude from the benefit of the policy the members of the common establishment in which the assured lives.

For these reasons, I would dismiss the appeal.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors for appellant: *Edward Betteley, Smith & Stirling.*
Solicitors for respondent: *William Charles Crocker.*

R. F. S.

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(1) [1927] A. C. 487, 509.

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MANLEY ESTATES, LIMITED *v.* KAYTON.

[1939. M. 2155.]

Moneylenders—Memorandum of contract relating to loan—Rate of interest charged on loan correctly stated—Collateral security—Bill of exchange—Amount due for loan and interest payable under bill earlier than date for repayment of loan—Whether rate of interest correctly stated—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

On April 5, 1939, moneylenders lent to a borrower the sum of 80*l.* repayable at the end of three months with 20*l.* interest, which was stated in the memorandum required by the Moneylenders Act, 1927, to be interest at the rate of 100 per cent. per annum. The borrower gave by way of collateral security a bill of exchange for 100*l.* dated March 28, 1939, and payable three months after date, of which the borrower was the drawer and endorser and the defendant company the acceptors. In an action to recover the amount due on the bill of exchange from the acceptors:—

Held, that although the bill of exchange matured for payment on July 1, 1939 (allowing for days of grace) which was four days before the date for repayment of the loan with interest, the rate of interest had not been wrongly stated in the memorandum so as to render the transaction (including the security) unenforceable under s. 6 of the Moneylenders Act, 1927, because even if the lenders had received payment under the bill of exchange on July 1, 1939, they must have held the sum received on trust for the borrower, subject only to payment to themselves of the loan and interest as soon as they fell due.

APPEAL from Greaves-Lord J.

On April 5, 1939, the defendant Henry Kayton obtained a loan of 80*l.* from the plaintiffs Manley Estates, Ld., who were licensed moneylenders, repayable at the end of three months with 20*l.* interest, being interest at the rate of 100 per cent. per annum. The following memorandum of the transaction was signed by the defendant Kayton and addressed to Manley Estates, Ld., 7, Maddox Street, London: "I am willing to "borrow from you on the 5th day of April 1939 the sum of "80*l.* with the sum of 20*l.* for agreed interest being at the rate "of 100 per cent. per annum as calculated in accordance with "the provisions of the First Schedule to the Moneylenders Act "1927 and on the terms of a promissory note as hereunder. "I agree to deposit with you as collateral security a B/E for

"100*l.* dated 28/3/39 drawn and endorsed by me and accepted "by Pressman Bros. & Co." Attached to the memorandum was a promissory note dated April 5, 1939, to pay 100*l.* on July 5, 1939, and the borrower gave by way of security for repayment of the loan a bill of exchange dated March 28, 1939, for the sum of 100*l.* payable three months after date of which the defendant Kayton was the drawer and endorser and the defendants Pressman Bros. & Co. acceptors. The bill therefore became due (allowing for days of grace) on July 1, 1939, but it was dishonoured on presentation and the loan and interest were not paid.

On July 8, 1939, the plaintiffs commenced these proceedings by specially endorsed writ to recover against the defendant Kayton and the defendants Pressman Bros. & Co. the amount due on the bill with interest. The defendants Pressman Bros. & Co. obtained leave to defend on the ground that the memorandum did not contain the true terms of the transaction referred to and did not comply with the requirements of s. 6 of the Moneylenders Act, 1927, with the result that the transaction was void and the plaintiffs' claim unenforceable. The action was not proceeded with against the defendant Kayton.

It was claimed that as the bill of exchange became payable on July 1, 1939, in place of July 5, 1939, the date when the three months' loan became repayable, the interest being charged by the lenders was in truth 104·8 per cent. and not 100 per cent. as stated in the memorandum, and that the whole transaction was therefore void under s. 6 of the Act of 1927.

Greaves-Lord J. gave judgment in favour of the plaintiffs, saying that there was nothing in the form of the document to prevent the plaintiffs suing.

The defendants, Pressman Bros. & Co., appealed. The appeal was heard on May 8, 9, 1940.

Harold Simmons for the appellants. This was an action on the bill of exchange only; but as it was security for a moneylending transaction it is void by reason of its failure to comply with s. 6 of the Moneylenders Act, 1927. Under that section

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the memorandum required in respect of any moneylending transaction has to express correctly the interest charged as a rate per cent. per annum. Here the rate of interest is stated to be 100 per cent. per annum and as the bill of exchange fell due, allowing for days of grace, four days before the loan was repayable and the amount recoverable on the bill represented the principal and interest due four days later, the lenders were in fact charging interest at the rate of 104·8 per cent. per annum.

[SIR WILFRID GREENE M.R. The bill of exchange was only a security.]

On the date the bill fell due, the loan with interest to date was less by 18*s.* 7*d.* than the sum due on the bill. The whole object of the section would be defeated, if by the device of a security the lender could receive a higher rate of interest. The memorandum of the transaction is defective as showing the wrong rate of interest on the transaction.

Cyril Salmon for the respondents. The position of the respondents as pledgees of the bill of exchange is that when they receive the proceeds of the bill they hold it as trustee for the pledger subject only to satisfying their debt: see Chalmers on Bills of Exchange, 10th ed., p. 103. If then on July 1, the respondents had been paid the sum of 100*l.* due on the bill of exchange, they would have held the sum on trust for the borrower and if he defaulted in paying the amount due for principal and interest on July 5, they could then pay themselves this amount and only hold the balance (if any) on trust for the borrower. The alternative view is that the lenders could at once on July 1 take out of the 100*l.* the principal with interest at the proper rate down to that date, leaving a balance of 18*s.* 7*d.* to be handed to the borrower. But the better view is that the whole sum of 100*l.* has to be held on trust till the date when the debt and interest fall due. On either view the memorandum would have correctly stated the rate of interest. Suppose the borrower had deposited a security that would realize 150*l.*, it is clear that the lenders could only pay themselves their 100*l.* and must refund the balance. There is no reality in the suggestion that the lenders would receive 18*s.* 7*d.* more than the amount due to them; for they must wait to pay themselves till the debt and interest fall due. It is only because the amount of the security is the same as the amount of the debt and interest that the appellants' contention is given any colour. It is a misconception to say that the borrower would be paying a higher rate of interest if the bill of exchange had been satisfied on maturity.

Harold Simmons replied.

Sir Wilfrid Greene M.R. This appeal raises a question under s. 6 of the Moneylenders Act, 1927.

The appellants were acceptors of a three-months' bill of exchange drawn by their co-defendant, endorsed by him, and handed by him to the respondents, the plaintiffs in the action, who are moneylenders.

The statutory memorandum of the transaction was in the following form: "To Manley Estates, Limited, 7, Maddox "Street, London, W.1. I am willing to borrow from you on "the 5th day of April, 1939, the sum of 80*l.*, with the sum of "20*l.* for agreed interest, being at the rate of 100 per cent. "per annum as calculated in accordance with the provisions "of the First Schedule to the Moneylenders Act, 1927, and on "the terms of a promissory note as hereunder. I agree to "deposit with you as collateral security a B/E for 100*l.* "dated 28/3/39 drawn and endorsed by me and accepted "by Pressman Brothers & Company." Then follows a copy of a promissory note dated April 5, 1939, the due date for which is July 5, 1939. The note contains on its face a statement of the nature of the loan, the amount of principal and the amount of interest. That document was signed by the first defendant on April 5, 1939. It will be observed that the maturity date of the loan fell on a date later than the maturity date of the bill of exchange, that bill being the document upon which the present action was brought. The maturity date for the loan which was to be repaid in accordance with the terms of the promissory note was July 5, 1939. On the basis that the loan was for that period, the calculation of interest expressed in the memorandum is admittedly correct, that is to say, interest on 80*l*. for three months at 100 per cent is 20*l*. But the maturity date of the bill of exchange which was deposited as collateral security was June 28, 1939, or, allowing for days of grace, July 1, that is to say, four days earlier than the maturity date of the promissory note.

The sole point raised upon this appeal, and raised also before the learned judge, is that the memorandum fails to comply with s. 6 of the Moneylenders Act, 1927, in one particular only, namely, that the rate of interest is inaccurately stated. The basis of that argument is that 20*l*. interest on a loan of 80*l*. for a period ending on the date on which the bill became payable, July 1, is not 100 per cent., but 104.8 per cent.

I will now read the relevant parts of s. 6 of the Act. Sub-s. 1 provides: "No contract for the repayment by a borrower "of money lent to him or to any agent on his behalf by a "moneylender after the commencement of this Act or for the "payment by him of interest on money so lent and no security "given by the borrower or by any such agent as aforesaid in "respect of any such contract shall be enforceable, unless a "note or memorandum in writing of the contract be made "and signed personally by the borrower"; and then follow some other provisions which I need not read. I pause to say that it is not disputed that the bill of exchange in the present case was a security given by the borrower, and would, accordingly, be unenforceable if the provisions of the section had not been complied with.

Sub-s. 2 of s. 6 provides: "The note or memorandum "aforesaid shall contain all the terms of the contract, and in "particular shall shew the date on which the loan is made, the "amount of the principal of the loan, and, either the interest "charged on the loan expressed in terms of a rate per cent. "per annum, or the rate per cent. per annum represented by the "interest charged as calculated in accordance with the "provisions of the First Schedule to this Act." The contract in the present case was a contract for a loan of a sum of 80*l*. bearing interest at the rate of 100 per cent. per annum repayable in three months, with a promissory note to cover it, and a bill of exchange for the stated amount of 100*l*. of the stated date, March 28, 1939, deposited as collateral security. That is what the memorandum states the contract to have been: and it seems to me that that statement of the contract is perfectly accurate. That is exactly what the contract was. The only obligation in the matter of interest under which the borrower places himself is to pay interest at the stated rate. The giving of security does not increase his obligation in the matter of interest at all. The security is the security for the loan, namely, the principal and interest. If a security deposited for a loan realizes more than the amount of the loan, of course the lender is accountable to the borrower for the difference. The only thing the lender who holds the security is entitled to do is to pay himself out of the security the true amount of the debt, principal and interest, and nothing more, except, of course, costs, if there are any, which he is entitled to add to his security. Accordingly, on the face of it, the document appears, as I have said, to state with complete accuracy the precise nature of the contract between the parties. But it is attacked upon one ground, and one ground only. It is said that if and when the sum of 100*l.* is paid upon the bill by the borrower or by the appellants on July 1, the effect of that will be that the rate of interest has been increased: in other words, it is said that the effect is to convert a three-months' loan at 100 per cent. into a loan for three months less four days at 104.8 per cent. The precise difference in terms of money, we were told, is 18*s.* 7*d.*

In my opinion, that argument rests upon a fallacy. There is no such sum as 18*s.* 7*d.* anywhere in this transaction. When the amount due on the bill is paid on July 1, it is not the case that a payment is being made in repayment of the loan of 80*l.* at 100 per cent., plus an additional 4.8 per cent., that is, 18s. 7*d.* The payment on the bill is as security and as nothing else. It is in no sense a payment by the borrower or by the present appellants of a sum which can be split into principal and interest with four days' extra interest included in it. In my view, that is the real fallacy underlying the argument for the appellants.

I have already said that, insofar as the proceeds of a security

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exceed the amount of a loan with its appropriate interest, the holder of that security must hold the balance for the benefit of the borrower. If in the present case the lender recovered 100*l.* under the bill on July 1, that 100*l.* being security, would have to be held by him as security and nothing else; and his right would be to use it, when the loan fell due, for repayment of the principal and interest.

It so happens that the amount of this security is precisely identical with the amount of the loan and the interest for three months. If the lender having recovered 100*l.* on July 1, had by its use earned 18*s.* 7*d.* interest between that date and July 5, then on July 5, when the loan fell due for repayment, he would be holding as security for the 100*l.* the sum of 100*l.* 18*s.* 7*d.* His duty then would be to pay himself his 100*l.* and hand over 18*s.* 7*d.* to the person who had provided the security. In point of fact, no such sum of 18*s.* 7*d.* or any other sum, has ever been earned by this security sum of 100*l.* As I have said, no such sum has ever come into existence. The only way in which such a sum could have come into existence would have been if the proceeds of the security had earned that sum by way of interest.

The point at first sight presented a certain appearance of doubt, but, in my judgment, when the matter is analysed (and I hope that I have analysed it correctly) the position becomes perfectly clear.

The result is that the learned judge's decision was perfectly right, and the appeal must be dismissed with costs.

SCOTT L.J. I agree.

MACKINNON L.J. I agree.

Appeal dismissed.

Solicitors: *Janus Cohen & Co.; M. A. Jacobs & Sons.*

H. C. G.

MURPHY *v.* THOMAS E. GRAY AND COMPANY, LIMITED.

1940
May 2, 3.

Revenue—Income tax—Accident insurance—Insurance by employer in respect of employee—Lump sum paid thereunder for fatal accident—Inclusion in income tax return.

A company took out an accident insurance policy whereby, if any employee was killed or disabled by any accident, the insurance company undertook to pay certain specified sums depending on the injuries received. W., an employee, was killed by accident and a lump sum was paid to the company in respect of his death :—

Held, that the lump sum was a trading, and not a capital receipt, and that the company was assessable to income tax in respect of it.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the Commissioners on February 10, 1938, Thomas E. Gray & Co., Ld. ("the company"), appealed against an assessment made on them under Case I. of Sch. D for the year ended April 5, 1938, in the sum of 7566*l.*, less wear and tear 529*l.*

The company were manufacturers of foundry material supplies and before 1935 they had taken out an insurance policy under which, in the event of certain of their higher paid employees who were outside the protection of the Workmen's Compensation Acts sustaining any injury caused by "a violent "accidental, external and visible means, which injury shall "solely, and independently of any other cause, result in his "death or disablement," the company were entitled to receive "the sum or sums of money specified in the following schedule "of compensation." In the case of death or total disablement, the sum payable was a lump sum ; in the case of temporary disablement, the sum payable was a weekly sum during the period of disablement, but for not more than fifty-two weeks. The yearly premiums paid in respect of the policy were debited to profit and loss account. The policy was not an indemnity policy, the policy moneys being payable irrespective of any claim against the company.

In 1935 a Mr. Waterfield, the company's works manager,

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met with a fatal accident, and the insurance company paid the company 937*l.* 10*s.* in respect thereof, which sum was credited to profit and loss account. Certain ex gratia payments were made by the company to the widow and were treated for income tax purposes as an expense of the business.

The Commissioners held that the 937*l.* 10*s.* was not a trading receipt of the company, and that the premiums were allowable as deductions as expenses of the trade.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The fact that the payment was a lump sum does not make it a capital payment. It was a business receipt. Mr. Waterfield may have been of the greatest value to the respondents, and they had an insurable interest in his life, and if they quantified the value of those services without fraud, the insurance money represented that value and was a payment in the ordinary course of business. [*Rex* v. *B. C. Fir and Cedar Lumber Co., Ld.* (1), and *Gray* v. *Lord Penryn* (2) were referred to.] The respondents say that they do not trade in accidents and the collection of insurance moneys. That was the argument rejected by Rowlatt J. in *H. J. Green* v. *J. Glikſten & Son, Ld.* (3) In *Mitchell* v. *B. W. Noble, Ld.* (4), Rowlatt J. said: "it is a capital expense if you buy an asset or purchase an "enduring advantage." It is impossible to regard loss of services through death as a capital loss, and, therefore, the payment received in respect of it must be, not a capital receipt, but a trade receipt. It is desired to keep open the point as to the deductibility of the premiums.

Heyworth Talbot for the respondents. The yearly premiums had been allowed as a deduction and there is a clear connection between that fact and the present question. If one insures the fabric of a factory he is clearly entitled to deduct the premiums, and equally clearly he is not taxable in respect of the insurance moneys if the fabric is destroyed. Every transaction which produces a profit does not produce a taxable profit: *McKinlay*

(1) [1932] A. C. 441, 447.
(2) (1937) 21 Tax Cas. 252.
(3) [1928] 1 K. B. 475, 481; 14 Tax Cas. 364, 375.
(4) [1927] 1 K. B. 719, 728; 11 Tax Cas. 372, 415.

v. *Jenkins* (*H. T.*) *& Son, Ld.* (1) The profit must arise out of the trade. The suggested profit here did not arise from the respondents' trade, which was that of iron founders. In *H. J. Green* v. *J. Gliksten & Son, Ld.* (2), the answer to the taxpayers' argument that they did not trade in fires was that they traded in timber and that the insurance money received for burnt timber represented the timber and was equivalent to cash paid for it. But Mr. Waterfield was not stock; if he were this money would be a capital receipt. The question whether this was a trade receipt or something else is a question of fact.

Sir Donald Somervell A.-G. replied.

MACNAGHTEN J. The question at issue on this appeal is whether the sum of 937*l.* 10*s.* received by the company under the policy should be credited in the accounts made up to arrive at the assessment of the profits and gains of the company for the year ending April 5, 1938, for the purposes of income tax.

During the argument the question was mooted whether this was a wager policy or gaming policy, but counsel for the appellant and the respondents agreed that it was not such a policy and that the company had an insurable interest in the lives of their employees, and also in their disability by accident.

It is to be observed that the accident causing the injury to the employee, although it might arise in the course of his employment, need not so arise. Any injury happening to the employee caused by violent accidental, external and visible means wholly unconnected with his employment would give rise to a claim against the insurance company. In years past the premiums payable on the policy have been treated as a trading expense in the assessment of the company to income tax, but the company contend that the sum of 937*l.* 10*s.* received by them on the death of Mr. Waterfield ought not to be brought into the account as a trading receipt. The Crown, on the other hand, contend that both the premiums on the policy and the amount received under it ought to be included in the assessment of

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(1) (1926) 10 Tax Cas. 372.

(2) [1928] 1 K. B. 475, 481; 14 Tax Cas. 364, 375.

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the company, or, alternatively, that if the sum received in respect of the death of Mr. Waterfield is to be excluded from the assessment, the premiums on the policy ought also to be excluded.

The Commissioners have found "that the sum of 937*l.* 10*s.* "was not a trading receipt of the company," and Mr. Talbot has submitted that that was a finding of fact, but I think that the finding must mean that the 937*l.* 10*s.* is to be treated as a receipt on capital account which should be excluded from the amount of the assessment of the company for the purposes of income tax. The question whether that receipt was to be credited to capital account or to income account is a question of law on the facts stated in the case.

That the company has an interest in the continuance of the ability of its employees to carry on their employment is common ground between the parties. If an employee suffers an injury coming within the description of the injuries in the policy which merely disables him from performing his duties for a time, the policy provides for the payment of a weekly sum and it seems clear that that must be regarded as a receipt on income account. If, in the case of an employee who is unable to attend to his employment by reason of injuries received in the manner described in the policy, the company continue to pay his wages, the wages so paid would be treated as a trading expense. The sum received to compensate them for the payment of those wages, as it appears to me, could not, by any process of reasoning, be regarded as a payment on capital account, or a payment in the nature of capital.

Does the same result follow in the case of death or total disablement ? One would have supposed that total disablement, however caused, would result in the same amount of loss to the company, but, curiously enough, the schedule of compensation does not so provide. In the case of death or loss of sight, or the loss of both hands or both feet, or one hand and one foot, or in the case of the loss of one hand or one foot with the loss of one eye, the same sum is payable. But in the case of the total loss of all sight in one eye, or the total loss by physical separation of one hand or one foot, the amount payable is one-half of what would be payable in the former cases. When you come to permanent total and absolute disablement, other than those mentioned previously, "from "following usual profession or occupation, or engaging in or "giving attention to profession, business or occupation of "any kind," a lump sum is payable which is even smaller. But, although it is difficult to see why that variation is made in the amount to be paid, it is an amount which, as between the parties, has been fixed. Are those payments on capital account or on income account, using the word "income" in the sense of receipts which must be brought into account for the purpose of arriving at the assessment to income tax?

The conclusion to which I have come is that those payments should be included in the income account. I do not see how it is possible to hold that, in the case of temporary disablement the payments must be treated as received on income account, while a lump sum payable in other circumstances should be treated in a different way. The total disablement of an employee admittedly causes loss to the company, against which they are entitled by law to insure. The parties having assessed the amount of that loss at a particular figure, as in the case of a value policy in marine insurance, that is the amount which has to be paid, and it remains of the same character as the amounts which, in the case of partial disablement, would be paid week by week.

My conclusion, therefore, is that the finding of the Commissioners that 937*l.* 10*s.* was not a trading receipt, but should be credited to capital account, was erroneous in point of law and should be reversed.

Appeal allowed.

Solicitor for the appellant: *Solicitor of Inland Revenue.*
Solicitors for the respondents: *Morgan, Price, Morley & Rugg.*

W. L. L. B.

1940
May 3.

HYETT (Inspector of Taxes) *v.* LENNARD.

Revenue—Income tax—Profits or gains arising from a trade—Deductions —Disbursements wholly and exclusively for the purposes of the trade —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Rules applicable to Cases I. and II. of Sch. D, r.* 3 (*a*).

By r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D. to the Income Tax Act, 1918 : "In computing the amount of the "profits or gains to be charged, no sum shall be deducted in "respect of (*a*) any disbursements or expenses, not being money "wholly or exclusively laid out or expended for the purposes of "the trade."

The respondent at all material times had carried on business as a tailor at a number of shops in London and its suburbs. In October, 1930, he, having obtained the transfer to himself of a lease of shop property at 50, Oxford Street, opened a shop at that address as a branch of his business. The lease was for a term of thirty-five years from March, 1929, but in July, 1935, as the branch was involving the respondent in loss, he closed it and sub-let the premises for the remainder of the term of the lease (except five days) at a rent which was 1000*l.* a year less than the rent payable under the lease. The Special Commissioners of Income Tax held that the difference between the rent which the respondent paid and the rent which he received was a disbursement or expense wholly and exclusively laid out or expended for the purpose of his trade within r. 3 (*a*). The Crown appealed :—

Held, that the sum which the respondent sought to deduct was money payable pursuant to an obligation which he had entered into wholly and exclusively for the purposes of his trade ; that the obligation which he entered into when he took an assignment of the lease continued to be an expense of his trade for the whole currency of the lease ; and that he did not lose his right to deduct that expense from his trade profits because he had been able to reduce the loss by sub-letting the premises.

Case stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners held on May 4, 1939, the respondent, C. Lennard, appealed against an additional assessment in the sum of 6000*l.* for the year ending April 5, 1938.

The assessment was made under Case I. of Sch. D to the Income Tax Act, 1918, and was in respect of the respondent's profits as a ladies' tailor. The respondent at all material times had carried on business at some nine or ten shops in London and its suburbs under the style of C. & A. Lennard. On

October 26, 1930, the respondent, having obtained the transfer to himself of a lease of a shop property at 50, Oxford Street (which lease had been, in April, 1929, granted by St. Edmunds Properties, Ld., to a company named James Walker (Jewellers), Ld.), opened a shop at that address as a branch of his business. The lease was for a term of thirty-five years, from March 25, 1929, and contained no provision for earlier determination at the option of the lessee. The rent reserved thereunder was 3500*l.* per annum. The respondent acquired the lease wholly and exclusively for his business.

The respondent carried on business at 50, Oxford Street, for about four and three-quarter years. For the first two years of that period the shop proved profitable, but thereafter it involved the respondent in serious and increasing losses. On July 28, 1935, he closed the business at that shop, but he continued to carry on business at his nine other shops. The respondent's sole reason for closing the shop was that it had become unprofitable. By an underlease dated July 29, 1935, between the respondent, of the one part, and Joseph Aaron Littman, of the other part, the respondent demised to Littman 50, Oxford Street, for a term of twenty-eight and three-quarter years less five days from June 24, 1935, at a yearly rent of 2500*l.* The respondent's sole object in granting the underlease was to reduce as far as possible the burden on him of the continuing liability to pay the rent of 3500*l.* per annum under the head lease. In the respondent's profit and loss account for the year ending December 31, 1936, the rent of 3500*l.* paid by the respondent was entered as an expense, and the rent of 2500*l.* received by him from Littman was entered as a receipt.

The question for the opinion of the Court was whether the rent of 3500*l.*, less the sub-rent of 2500*l.*, was an admissible expense in computing the profits arising from the respondent's trade for the purpose of assessment under Case I. of Sch. D.

The Commissioners held that the rent of 3500*l.*, less the sub-rent of 2500*l.*, was money wholly and exclusively laid out or expended for the purposes of the respondent's trade and was a proper deduction in computing his profits for assessment under Case I. of Sch. D, and they reduced the assessment under appeal to 2730*l.*, less 192*l.* wear and tear. They were of opinion that their decision was in accordance with the principle laid down in *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1)

The appellant, the inspector of taxes, appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the appellant. These disbursements are not wholly and exclusively laid out for the purpose of the trade which the respondent was carrying on. The principle to be applied was stated by Lord Davey in *Strong & Co., Ld.* v. *Woodifield* (2) as follows: "These words [for "the purpose of the trade] appear to me to mean for the "purpose of enabling a person to carry on and earn profits in "the trade." In *Union Cold Storage Co.* v. *Jones* (3) the same principle was applied, and fire insurance premiums were held not to represent money wholly and exclusively laid out or expended for the purpose of the trade. If the respondent had obtained a larger rent and so made a profit on the premises, that profit would not have been chargeable to tax as the profits of his trade. Had the respondent kept the premises ready for putting goods in when required, it could not have been said that he had ceased to use them for the purpose of his business in the income tax sense. They would have remained part of the structure of his business, but when he parted with possession of the premises for so long a period as twenty-eight years, they ceased not only to be used for the purpose of his trade but to be available for such use. The Commissioners, in applying *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1), apparently misread certain observations of their Lordships, which they appear to have taken to mean that it is sufficient in such a case as this to show that obligations under a long lease were originally undertaken for the purpose of the taxpayer's business.

[*Cowcher* v. *Richard Mills & Co., Ld.* (4), and *Union Cold Storage Co.* v. *Simpson* (5) were also referred to.]

(1) (1933) 17 Tax Cas. 625.

(2) [1906] A. C. 448, 453; 5 Tax Cas. 215, 220.

(3) (1924) 8 Tax Cas. 725.

(4) (1927) 13 Tax Cas. 216.

(5) (1938) 22 Tax Cas. 547.

Heyworth Talbot for the respondent. The authorities show that there is a fundamental distinction between payments which are revenue in character and payments which are capital in character. Insurance premiums are capital payments and cannot be deducted from profits. If a trader, saddled with a heavy loss and under contractual obligation to make annual payments, bargains to pay a lump sum to be relieved of that obligation, the lump sum payment comes within the category of capital payments. Rent, on the other hand, comes within the category of revenue and may be deducted from profits. That is the distinction between *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1), and cases such as *Mallett* v. *Staveley Coal & Iron Co., Ld.* (2), and *Union Cold Storage Co.* v. *Jones.* (3) The decision in *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1), is conclusive in this case. There is nothing to indicate that the principle there laid down depends on the length of the lease. The sole object of granting the sub-lease in the present case was to reduce the burden on the respondent's business of a continuing liability.

MACNAGHTEN J. stated the facts and continued: I have been referred to a number of cases, but none of them, it seems to me, deals with the exact point raised in this case. If the St. Edmunds Properties, Ld., had been willing to accept a surrender of the lease, the cases cited show that a sum paid by the respondent to obtain their consent to its surrender would not be money wholly and exclusively laid out for the purposes of the trade within the meaning of r. 3 of the Rules applicable to Cases I. and II. of Sch. D. If he could have found a person who would have taken an assignment of the lease, and he had paid to the assignee a sum of money in consideration of his doing so, that also would have been an expense which could not be deducted for the purposes of income tax. But in this case, as in no other case that has been brought to my attention, except *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1), the point has been raised where the amount

(1) 17 Tax Cas. 625.
(2) (1928) 13 Tax Cas. 772.
(3) 8 Tax Cas. 725.

that the taxpayer sought to deduct was the sum which he had to pay pursuant to an obligation which he had entered into for the purposes of his trade. The respondent took the assignment of the lease of 50, Oxford Street, for the purpose of carrying on his trade there, and by the assignment the whole residue of the term became vested in him and he became liable to pay the 3500*l.* to the St. Edmunds Properties, Ld., for the residue of the term. I ventured to put the question, both to the Attorney-General and to Mr. Hills, whether, if the respondent had left the premises vacant for the rest of the term of the lease, and had made no use of them, but had continued to carry on his trade as theretofore at his other shops, he would have been entitled year by year to deduct the rent of 3500*l.* as an annual expense of the trade. I am not quite sure what was their answer, but I think they conceded that he would have been entitled to deduct it for a reasonably short time—not for so long as twenty-eight years. I think that he would have been entitled in such circumstances to deduct the 3500*l.* as a proper trade expense for the whole of the residue of the term of the lease, and for this reason. He had taken an assignment of the lease and entered into obligations imposed on him thereby for the purposes of the trade, and it seems to me that the obligations which he thereby undertook continued to be expenses of the trade throughout the whole currency of the lease. I put to counsel the case of a contract of employment for a number of years, with an obligation, after the employee had attained a certain age, to pay him a pension. It was agreed that in such a case the pension which the trader had agreed to pay was an expense of the trade properly deductible from his receipts, although during the years after the employee had ceased to do any work he would be rendering no aid towards the carrying on of the business. I am fortified in this view by the opinions expressed by the Lord President and Lord Sands in *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1) In that case the Falkirk Iron Co. had taken a lease of a warehouse at Bristol for the purposes of their business. The lease was for ten years, with an option to break

(1) 17 Tax Cas. 625, 630, 632.

it at the end of five years. After occupying the warehouse for the purposes of their business for a little over two years the company ceased to carry on any part of their business there and sub-let certain portions of the premises, but not the whole of them. The Lord President said: "After a number of "years they" (the company) "discovered, contrary to their "expectations, that they no longer had need of it" (the warehouse at Bristol) "and it remained empty and on their "hands. In these circumstances, I have no doubt that the "rent which they continued bound to pay until the termination "of the tenancy was just as much a part of the expense laid "out exclusively for the purposes of the company's trade as "the rent of other warehouses in Glasgow, Edinburgh and "Liverpool, which continued to be profitably used." The judgment of Lord Sands is to the same effect. He said: "If a company enters into contracts for the purposes of its "business, genuinely and honestly—and nothing to the "contrary is suggested here—I think that expenditure in the "fulfilment of these contracts is expenditure for the purposes "of the business. There may be extreme cases in the way of "a very prolonged liability, but this is not the present case. "It is just an ordinary matter of business necessary for the "purpose of carrying on the general business of the firm and "it should, in ordinary course, fulfil a simple contract of this "kind, and the fulfilment of that contract is one of the "purposes of the business."

The decision in *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1), does not, however, precisely cover the present case, because in that case the period of the lease during which the company had to pay rent when they were not using the warehouse was something less than three years. Here the period is something over twenty-eight years, and whereas in *Inland Revenue Commissioners* v. *Falkirk Iron Co., Ld.* (1), the company had not parted with the possession of the whole of the premises, in this case a sub-demise of the whole of the leased premises has been granted for the full period of the lease, less five days. Do those facts, differentiating this case from

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(1) 17 Tax Cas. 625.

Inland Revenue Commissioners v. *Falkirk Iron Co., Ld.* (1), make any difference to the conclusion that ought to be drawn? I do not see on what ground it can be held that, if the lease has only three years to run, the rent continues to be a deductible expense, but if it has twenty-eight years to run it cannot be deducted at all. If it was an expense of the trade during the first year or two after the business was no longer carried on at the premises, how could it cease to be an expense of the trade during the later years? So, also, I do not see how the fact that the respondent has got rid of all interest in the premises except the five days in 1964 can make any difference. If I am right in thinking that, if he had left the premises vacant, he could deduct the rental of 3500*l.* throughout the whole term of the lease, he surely cannot lose that right because he has been able to reduce his loss by sub-letting the premises for a smaller sum.

I desire to refute the suggestion that my decision to-day is inconsistent with a decision which I gave in *Union Cold Storage Co.* v. *Ellerker.* (2) The facts in that case were that the Union Cold Storage Co. by a payment of 6000*l.* obtained a cancellation of a lease of premises at Liverpool granted to them by the London, Midland and Scottish Railway Co. The obligation to pay the 6000*l.* did not arise out of any contract made by the Union Cold Storage Co. for the purposes of their business. It arose out of an agreement which they had made with the London, Midland and Scottish Railway Co. for the surrender of the lease. That is the distinction, and, as it seems to me, the vital distinction, between that case and the present case. Here the respondent has to pay the rent of 3500*l.* pursuant to an obligation which he entered into for the purposes of his trade. It is because he entered into that obligation wholly and exclusively for the purposes of his trade that, in my opinion, he is entitled to deduct it.

The result is that the appeal is dismissed, with costs.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondent: *E. FitzGerald Sargent.*

(1) 17 Tax Cas. 625.

(2) 22 Tax Cas. 547, 564.

A. W. G.

BEARE (INSPECTOR OF TAXES) *v.* CARTER.

1940
April 26, 30;
May 9.

Revenue—Income tax—Annual profit or gain—Licence to publish edition of book—Fee paid to author—Capital payment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI.*

By an agreement between an author and publishers the author agreed, in consideration of the payment to him by the publishers of 150*l.*, to grant to the publishers a licence to publish the sixth edition of 1050 copies of a book written by him of the copyright in which he was the owner. No other book written by the author had been published:—

Held, that there was evidence on which the General Commissioners of Income Tax could find that the 150*l.* was in the nature of a capital payment and not an annual profit or gain of the author within Sch. D, Case VI., of the Income Tax Act, 1918, and, therefore, that the author was not assessable to income tax in respect thereof.

Inland Revenue Commissioners v. *Longmans Green & Co., Ld.* (1932) 17 Tax Cas. 272 distinguished.

Inland Revenue Commissioners v. *British Salmson Aero Engines, Ld.* [1938] 2 K. B. 482; 22 Tax Cas. 29 applied.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners held on March 8, 1939, the respondent, Dr. A. T. Carter K.C., appealed against an assessment to income tax under the rules applicable to Sch. D, Case VI., of the Income Tax Act, 1918, for the year ended April 5, 1936, in the sum of 150*l.* in respect of literary profits.

The respondent was the author of a book entitled "History "of the English Courts." The first edition of the book was published in 1899 and further editions of 1000 copies each were published in 1902, 1906, 1910 and 1927. In 1935 the respondent was informed by Butterworth & Co. (Publishers), Ld., who were the publishers of the book, that the edition of his book published in 1927 had been sold out and it was arranged that a further edition (the sixth) should be published. It was agreed that the respondent should be paid by the publishers the sum of 150*l.* for the licence to publish that edition of 1050 copies and that the payment of that sum of 150*l.* should include such editorial work as was necessary to ensure the accuracy of the edition. (1) The copyright remained in the respondent and he agreed to prepare the edition for Press to the approval of the publishers. There was no written agreement between the respondent and Butterworth & Co., but the terms of the agreement between them were subsequently set out in a letter dated July 7, 1938, written to the respondent at his request by Butterworth & Co., a copy of which was put in and formed part of the Case. The letter was as follows: "Dear Dr. Carter, with "reference to your two letters, I am writing to confirm that, "with regard to the sixth edition of your book on legal history, "under the agreement between us we paid you the sum of "150*l.* for the licence to publish that edition of 1050 copies of "that book, which sum included such editorial work as was "necessary to ensure the accuracy of the edition. The copy-"right remains in you, but we had a licence to publish that "edition, and you agreed to prepare the edition for Press to our "approval." No other book written by the respondent had been published.

The Commissioners allowed the appeal on the ground that the 150*l.* was in the nature of a capital payment, and the appellant, the inspector of taxes, appealed.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the appellant. Copyright is capital (per Rowlatt J. in *Curtis Brown, Ld.* v. *Jarvis* (2)), and the purchase price for a transfer of copyright is capital, but royalties are income and what the respondent has received here is a payment in the nature of a royalty. A distinction must be made between the tree and the fruit of the tree. Here the respondent transferred, not the tree, but only the fruit of the tree. It does not follow from the fact that the payment was of a lump sum that it was in the nature of capital: *Mills* v. *Jones*. (3)

(1) The book, however, needed so little revision, and the services rendered by Dr. Carter in this respect were so small, that the appeal was argued on the basis that the 150*l.* should be treated as having been paid merely for permission to publish the edition.

(2) (1929) 14 Tax Cas. 744, 749, 750.

(3) (1929) 14 Tax Cas. 769.

L. C. Graham-Dixon for the respondent. The respondent, in granting the licence to the publishers, was partly realizing a capital asset, because damage to the value of his copyright followed the granting of the licence. If the Crown wants to succeed it must do so by showing that the respondent was carrying on a trade within Case I. of Sch. D, but the Case stated finds that no other book of his had been published, and, therefore, he cannot be said to be carrying on a trade. This was an isolated transaction: *Leeming* v. *Jones*. (1) The payment received by the respondent was not calculated on royalties as was part of those in *British Salmson Aero Engines, Ld.* v. *Inland Revenue Commissioners*. (2) It had no "annual "existence": per Sir Wilfrid Greene M.R. (3) The question whether a payment is in the nature of capital or income is a question of fact, and the conclusion of the Commissioners should not be lightly disturbed. (4)

Cur. adv. vult.

1940. May 9. MACNAGHTEN J. stated the facts, and continued: That copyright is property and that a price paid for an out-and-out purchase of copyright is capital are propositions which are not disputed by the Crown. On the other hand, royalties are income and that is not disputed by the respondent. The line to be drawn between payments which are capital and those which are income is by no means clear and distinct. Even if it were, there would still be border-line cases. The question in every case is a question of fact depending on the circumstances of the particular case under consideration. I apprehend that the decision on a question of fact of the Commissioners can only be reversed in such a case as the present if, on a consideration of the facts stated by the Commissioners, there was no evidence which would justify the decision at which they arrived.

The determining question in this case is: What were the terms of the contract between Dr. Carter and his publishers?

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(1) [1930] 1 K. B. 279, 301–302; 15 Tax Cas. 335, 353.

(2) (1938) 22 Tax Cas. 29.

(3) Ibid. 40.

(4) Ibid. 49.

The case says that: "In 1935 the respondent was informed "by Butterworth and Co. (Publishers), Limited, who were "the publishers of the book, that the edition of his book "published in 1927 had been sold out and it was arranged that "a further edition (the sixth) should be published. It was "agreed that the respondent should be paid by the publishers "the sum of 150*l.* for the licence to publish that edition of "1050 copies and that the payment of that sum of 150*l.* should "include such editorial work as was necessary to ensure the "accuracy of the edition." The copyright remained in the respondent, and he agreed to prepare the edition for Press to the approval of the publishers. There was no written agreement between the respondent and Butterworth & Co., but the terms of the agreement were subsequently set out in a letter dated July 7, 1938, written to the respondent at his request by Butterworth & Co. [His Lordship read the letter, and continued:] It will be observed that the letter does not purport to set out the terms of the agreement. It merely purports to confirm that 150*l.* had been paid for the licence to publish the edition, and that the payment included such editorial work as was necessary to ensure its accuracy, so when the Commissioners say in the case: "The terms of the "agreement were subsequently set out in a letter dated "July 7, 1938," it is, I think, plain that they do not mean that all the terms of the agreement were set out in that letter. My reason for saying that is that when a gentleman in the position of Dr. Carter is arranging with a publisher for the publication of such a work as the History of the English Courts, it is obvious that both the publishers and the author undertake obligations in addition to the mere payment of money on the one hand, and permission to publish the edition on the other. The author is obviously concerned that his work should be presented to the public in a suitable form. Butterworth & Co. had published five previous editions and it may well be that there was a written agreement in the case of the first edition and that the subsequent editions were subject to the same conditions. There would, I think, beyond all doubt, be obligations on the part of Dr. Carter in addition to the giving of the permission to the publication of the edition. Mr. Hills, when it was suggested that the licence to publish the sixth edition was an exclusive licence, maintained that, immediately after Dr. Carter had received the 150*l.*, he was at liberty to give a licence to publish to some other publisher for a smaller sum and thus enable a rival publisher to undersell Butterworth & Co. I think that Mr. Hills agreed that it would be improper for him to do so. Some people would call it dishonest. On the facts which appear in the case, it seems to me that the fair inference is that the licence to publish the sixth edition in consideration of the 150*l.* carried with it the obligation on the part of Dr. Carter to give no licence to anybody else to publish the work for a period of time, and if the parties had been asked the question: "Was there any such obligation?" both would have replied: "Of course there was."

For the reasons which I am about to give, I apprehend that there is no question of principle in this case at all, and that it is only a question whether, on the particular facts, there was any evidence which could support the decision of the Commissioners. If this were merely a lump sum payment for permission to publish so many copies of the work I apprehend that, on the authority of the cases which were cited to me, there is no doubt that the decision of the Commissioners would be wrong. The headnote of *Inland Revenue Commissioners* v. *Longmans Green & Co., Ld.* (1), is this: "The respondent company "entered into an agreement with a French author, whose "usual place of abode was not within the United Kingdom, "under which it acquired the exclusive right of translation and "publication in the English language of a book written in "French, and agreed to pay the sum of 500,000 French francs "for the right to sell 28,000 copies of the best edition of the "book. The agreement provided for annual payments to the "author, at a proportionate rate, for copies of the best edition "sold in excess of 28,000 and for a royalty of ten per cent. on "the published price of all copies of any cheaper edition. "Only 7000 copies of the book were, in fact, sold and the "respondent company was assessed to income-tax under s. 26

(1) 17 Tax Cas. 272.

"of the Finance Act, 1927, as extended by s. 25 of the same "Act, in respect of the sum of 500,000 francs payable under the "agreement." It was held by Finlay J. that the payment was a payment of or on account of royalties. As was pointed out by counsel for the respondent, he arrived at that conclusion by considering the amount of the lump sum payment and comparing it with the other payments which were to have been made and would admittedly have been royalty payments if the book had been a success. If there were nothing in the present case but that the 150*l.* was paid for permission to publish 1050 copies of the book, the decision in *Inland Revenue Commissioners* v. *Longmans Green & Co., Ld.* (1), would, I think, cover it. That decision conforms with that in *Curtis Brown, Ld.* v. *Jarvis* (2), where Rowlatt J. observed that copyright royalties were annual profits or gains as being the annual receipts from the property and not instalments of the purchase price, and also with the decisions in *Mills* v. *Jones* (3), where the inventor of Mills' bombs received a lump sum payment at the end of the war for the user of his invention by the Government during the war, and *Constantinesco* v. *Regem* (4), where it was laid down that a lump sum payment for the user of a patent would be properly treated as an annual profit or gain.

The case which was relied on on behalf of the respondent and appears to me to illustrate very well how fine is the distinction between payments which are to be regarded as capital and payments which are to be regarded as income is *Inland Revenue Commissioners* v. *British Salmson Aero Engines, Ld.* (5) In that case the headnote in Tax Cases states: "An English "company was incorporated in October, 1929, with the object "(inter alia) to acquire the sole licence to manufacture and "sell in the United Kingdom and its dominions, colonies and "dependencies the aeroplane engines made by a French "company. By an agreement dated October 25, 1929, the "company acquired such licence for a period of ten years in "consideration of the sum of 25,000*l.* (payable as to 15,000*l.*

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(1) 17 Tax Cas. 272.
(2) 14 Tax Cas. 744.
(3) 14 Tax Cas. 769.
(4) 43 Times L. R. 727.
(5) [1938] 2 K. B. 482; 22 Tax Cas. 29.

"on the signing of the agreement and as to the balance by "two payments of 5000*l.* at intervals of six months) and, in "addition, of sums of 2500*l.* payable ' as royalty ' "—these were the words in the agreement—" during each year of the currency "of the licence. It was provided that all payments under the "licence were to be made in Paris and that the licensees should "have the right to grant sub-licences within the territories in "which the licence extended. On appeal against assessments "under General Rule 21 for the years 1929-30 to 1933-34 in "respect of the amounts paid under the agreement of October 25, 1929, the company contended that all the payments "were instalments of a capital sum, which was the purchase "price of a capital asset, and that the company was not "assessable to income-tax in respect of any of the payments. "The Special Commissioners decided that the sum of 25,000*l.* "was a capital payment, but that the ten further payments of "2500*l.* were royalties or other sums paid in respect of the "user of a patent and that the company was assessable in "respect of the latter under General Rule 21." It was held that the decision of the Special Commissioners was right by both Finlay J. and the Court of Appeal.

The distinction obviously is extremely fine. The total amount to be paid in that case was 50,000*l.* made up of 25,000*l.* payable as to 15,000*l.* on the signing of the agreement and as to 10,000*l.* by instalments of 5000*l.* at the end of six and twelve months, and a further sum of 25,000*l.* payable at the rate of 2500*l.* every year. Applying that case to the present one, and in the view which I have formed of the agreement made between Dr. Carter and the publishers, it is sufficient for me to say that, in my opinion, there was evidence to support the conclusion at which the Commissioners arrived, and that the appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitor for appellant : *Solicitor of Inland Revenue.*
Solicitors for respondent : *Emmet & Co.*

G. F. L. B.

C. A.

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April 23, 24.

BRANDON *v.* REIDY.

[1939. B. No. 4280.]

Emergency legislation—Judgment debt—Application for leave to issue execution—Jurisdiction to grant leave where person liable is alleged to have no prospect of paying—Circumstances of debtor—Suggested alteration of Rules to bring in third party interested—Courts (*Emergency Powers*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-ss.* 1, 4—*Courts* (*Emergency Powers*) *Rules,* 1939, *rr.* 1, 10, 18.

The Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 4, provides that if, on any application to the appropriate court for such leave as is required under the section for the exercise of any of the rights and remedies therein mentioned, " the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper " :—

Held, by the Court of Appeal, that that sub-section is not, by reason of the occurrence in it of the word " immediately " or otherwise, limited to cases in which the person liable is only temporarily unable to discharge his liability and will be able to do so in the future, but that the sub-section and consequently the Act as a whole applies also to cases in which that person is unable to show that he will be able to discharge his liability at any particular time or even at any time.

Where, under the Courts (Emergency Powers) Act, 1939, the Master has made an order giving leave to enforce a judgment but suspending it on terms, and that order has been affirmed by the judge in Chambers, and afterwards varied by the Court of Appeal, an application by either party for a further variation of the order should be made to the Master and not to the Court of Appeal (see infra p. 203).

Suggestion by the Court of Appeal that the Courts (Emergency Powers) Rules, 1939, should be so extended that, in a case in which a landlord makes an application for leave to enforce a judgment for possession and rent against a tenant who has previously mortgaged his lease, it should be possible thereunder for the Court hearing the application to have before it not only the landlord and tenant but also the mortgagee.

The plaintiff, who was the lessee of a house at a rent of 350*l.* a year, sub-let it to the defendant at a rent of 500*l.* a year. The defendant, who was a young medical man, reconstructed and redecorated the house, established himself in part of it as a consulting surgeon, and let off rooms therein as consulting rooms to other medical men at rents totalling 1528*l.* a year. In order to pay for the work on the house he had obtained a loan of 4000*l.* from an insurance company on the security of a mortgage of the house and of a policy on his life with the mortgagees for the same amount at a yearly premium of 362*l.*, and he had borrowed from relatives and others upwards of 5000*l.* When the present war broke out the defendant was mobilized for service in a hospital at a salary of 550*l.* a year. Some of the tenants of the rooms were also called up for service and others found their practices reduced, so that there was a great falling off in the rents from the rooms. The defendant had available a sum of only 340*l.* a year and was unable to pay in full all the sums due from him, including his sub-rent, the interest on the mortgage money and on his other loans. The plaintiff having recovered judgment against the defendant for possession of the house and rent in arrear made an application under the Courts (Emergency Powers) Act, 1939, s. 1, for leave to enforce the judgment. The mortgagees were not parties to the proceedings:—

Held, by the Court of Appeal, that the leave asked for should be granted, but should be suspended provided the defendant paid to the plaintiff as rent his available income of 340*l.* a year in equal monthly instalments.

APPEAL from an order of Oliver J.

Mr. Henry Brandon (hereinafter called "the plaintiff") was tenant of the house, No. 148, Harley Street, in the county of London, under a lease from the Commissioners of Crown Lands, at a rent of 350*l.* a year.

By a sub-lease dated July 13, 1938, the plaintiff sub-let the house to Mr. J. P. Reidy, M.R.C.S., M.B., B.Ch. (hereinafter called "the defendant"), for twenty-five years, from July 5, 1937, at a rent of 500*l.* a year, payable quarterly.

The defendant, who was a young man, took the house as an investment, his objects being to reconstruct and redecorate it, to carry on there his practice as a consulting surgeon in his own consulting rooms, and to let out various other rooms there as consulting rooms to other members of the medical and surgical professions.

These objects he accomplished satisfactorily, and he let off rooms in the house at rents totalling 1528*l.* a year.

In order to enable him to do the work on the house it had been necessary for him to borrow 4000*l.* from the Equity and Law Life Assurance Society on a mortgage of the house at interest of 6 per cent. reducible to 5½ per cent., and, in addition, to take out with that society an endowment policy on his life for the same amount at an annual premium of 362*l.* odd, and he had also to borrow from relatives and others sums amounting to over 5000*l.*

Notwithstanding these obligations he was at first making the house pay, or, at any rate, running it without loss.

After September, 1939, when the present war broke out, the defendant was mobilized for service, being engaged in a hospital in London for dealing with war casualties, at a salary of 550*l.* a year payable monthly.

Most of his sub-tenants were also called up, leaving their consulting rooms and taking commissions in the services at salaries less than the sums they could earn in practice, while others found their practices reduced owing to the war. The defendant alleged that for the last quarter of 1939 he had been unable to collect more than 219*l.* of the rents of the rooms.

The defendant had available a sum of only 340*l.* a year, and was unable to pay in full all the sums due from him, including his sub-rent, the interest on the mortgage debt, the premium on the policy, and the interest on his other loans.

On November 23, 1939, in an action brought by the plaintiff, he recovered judgment against the defendant in default of appearance for possession of the house, payment of 132*l.* 17*s.* 6*d.* arrears of rent due on September 29, 1939, and premium on sub-lease, and payment of 72*l.* 18*s.* 8*d.* mesne profits.

The defendant afterwards paid the quarter's rent due on September 29.

On March 13, 1940, on a summons taken out by the plaintiff in that behalf, the Master made an order that the plaintiff be at liberty, under the Courts (Emergency Powers) Act, 1939, s. 1, to issue execution on or otherwise proceed to the enforcement of the judgment, but that such leave be suspended provided the defendant paid to the plaintiff 10*l.* a month, the first payment to be made on or before March 27, 1940.

On April 12, 1940, Oliver J. made an order dismissing an appeal by the plaintiff from the order of the Master, and affirming that order in substantially the same terms.

The plaintiff gave notice of appeal dated April 22, 1940, that the order of Oliver J. might be varied, and that the plaintiff might have leave to issue execution or otherwise proceed to the enforcement of the judgment without condition or stay.

R. T. Paget for the plaintiff, appellant. The order of the learned judge should be set aside or at least varied. The Master and the judge had no jurisdiction to make the order which they made or to impose any condition or restriction upon the plaintiff's right to enforce the judgment. The Courts (Emergency Powers) Act, 1929, s. 1, sub-s. 1, and consequently the Act as a whole, only applies to cases where the person liable is unable "immediately" to satisfy his judgment and other debts but will be able within a reasonable time to do so, and it has no application to a case, such as the present, in which there is no prospect of the person liable ever being able to pay all his debts. If the Court has jurisdiction to entertain the application, then, in the circumstances, it should in the exercise of its discretion give the plaintiff leave to enforce the judgment against the defendant unconditionally. The plaintiff as landlord of the defendant, is entitled to be paid his rent in full notwithstanding that the mortgagees and other creditors of the defendant are not paid. Unless the plaintiff had granted the defendant his lease, there could have been no mortgage of the lease. The defendant's present available income is not sufficient to pay his rent and it should all be applied towards paying it. If the plaintiff gets no more than is awarded to him by the judge's order, the result will be that he will be allowing the defendant possession and full use of the house for a much smaller rent than he has to pay to his own superior landlord. As the mortgagees are no parties to these proceedings, no special regard need here be had to their claim.

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B. L. A. O'Malley for the defendant, respondent. The plaintiff has no right to enforce his judgment debt except by leave of the Court under the Act of 1939. The Court has jurisdiction under the Act to entertain an application for leave to enforce a judgment or other debt in such a case as this. The word "immediately" in s. 1, sub-s. 4, only implies that if the person liable, whatever his prospect of being able to pay may be, cannot at once pay, he may obtain relief against execution. He need not show that he will be able to pay at any particular future time. In exercising its jurisdiction to enforce the judgment debt the Court ought in its discretion to take into account the other debts of the defendant and allow them proper weight: see per Greene M.R. in *A*. v. *B*. (1) Under the Courts (Emergency Powers) Rules, 1939, r. 18, the Court may suspend or vary an order made under s. 1 of the Act if in the circumstances it thinks it just to do so. Here the defendant is indebted to the mortgagees and other creditors as well as to the plaintiff, and it would not be right that the whole of his available income of 340*l*. a year should be paid to the plaintiff only. That income should be apportioned among the defendant's various creditors, and if the order of the judge is varied, the amount payable to the plaintiff thereunder should be reduced, or at least not increased.

The following cases were also referred to during the argument: *Blanket* v. *Palmer* (2); and *Metropolitan Properties Co., Ld.* v. *Purdy*. (3)

The judgment of the Court (SLESSER, SCOTT and GODDARD L.JJ.) was delivered as follows:

GODDARD L.J. This is an appeal from an order of Oliver J. in Chambers, who affirmed the order of Master Horridge made on an application by the plaintiff in the action for leave to proceed to enforce judgment in which he stayed the execution under the Courts (Emergency Powers) Act, 1939, so long as 10*l*. a month was paid by the defendant, the first payment to be made on April 27, 1940. The action is by a landlord against a tenant and the landlord by his writ dated November 8 sued the defendant, who is a young surgeon just hoping to start in practice when the war broke out and who is now serving the country, claiming possession of the premises 148, Harley Street, and also claiming one quarter's rent and mesne profits from September 29, 1939. The action was undefended and judgment was obtained for possession, for a quarter's rent, and for mesne profits at the rate claimed, 41*l.* 13*s.* 4*d.*

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(1) [1940] 1 K. B. 217, 226, 227.

(2) [1940] W. N. 97.

(3) [1940] 1 All E. R. 188.

The main question in the proceedings under the [Courts (Emergency Powers)] Act was whether or not the plaintiff was to have liberty to enforce his judgment for possession. It is only right and fair to the defendant to say that after the judgment he paid the quarter's rent due on September 29 for which judgment had been obtained. This is a case of very great misfortune for all parties; and one can certainly have the greatest possible sympathy with the defendant. The position which is disclosed is this. [His Lordship stated the facts substantially as above set out, and continued:]

The question is, what is to be done in the circumstances? Mr. Reidy, not unnaturally, takes up this position. He says that he has spent a great deal of money on this house; that he has incurred a debt to the Equity and Law Life Assurance Society on mortgage of 4000*l.*, and put in other moneys of his own; and that if this lease goes he will suffer a very severe loss. On the other hand, Mr. Brandon, the landlord, says that he is paying out of his own pocket at the present moment 350*l.* a year as rent to his superior landlord, and what Mr. Reidy is asking him to do involves that he is to be content with receiving only 120*l.* a year for the benefit of his tenant and of the Equity and Law Life Assurance Society.

The first point Mr. Paget took in his argument was that this is not a case in which the Court can exercise the jurisdiction of refusing leave to enforce the judgment, because the words of sub-s. 4 of s. 1 of the Courts (Emergency Powers)

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Act are these : "If . . . . the appropriate court is of opinion "that the person liable to satisfy the judgment or order, or "to pay the rent or other debt, or to perform the obligation, "in question is unable immediately to do so by reason of "circumstances directly or indirectly attributable to any war "in which His Majesty may be engaged, the court may refuse "leave for the exercise of that right or remedy, or give leave "therefor subject to such restrictions and conditions as the "court thinks proper." Mr. Paget's argument was that this Act is intended to be an Act for a moratorium and not one for the releasing of people for all time from their obligations, inasmuch as the presence of the word " immediately " in the section shows that what Parliament was contemplating was the case of a man who cannot at the moment pay but will be able to do so in the future. He contended that the position which is shown here is such that it is hopeless to suppose that Mr. Reidy will be able to pay in the future and that the Court, therefore, has no jurisdiction to give relief. This Court is not prepared to take such a narrow view of the section as that, or to construe " immediately " in the way that that argument would invite it to do. Were we to give such a narrow construction as that to the section it would very seriously circumscribe the beneficial object which the Act has in mind. We think that the presence of the word " immediately " results in no more than this : that if the debtor shows that he cannot pay at the time that the judgment is obtained against him then he can come to the Court and ask for relief, and while the Court can take into account a great many matters, as was shown in the case of *A.* v. *B.* (1) recently before this Court, it is not incumbent upon the debtor to show that at any particular time, or indeed at any time, he will be able to pay. The Court must exercise its discretion in the best way it can, bearing in mind that it is always open to either party to come back to the Court and ask for a review of the circumstances and a new order to pay.

Dr. Reidy's present financial position is this : It seems to be agreed on all hands that he has available a sum of about

(1) [1940] 1 K. B. 217.

340*l.* a year, provided that matters remain in their present state, such doctors as are left in the consulting rooms paying their rents and the expenses and so forth remaining the same. Mr. O'Malley has argued that that 340*l.* ought to be utilized partly in paying the landlord and partly in paying the mortgagees, who are the Equity and Law Life Assurance Society.

It is to be observed that the Court has not got the mortgagees before it. The Court thinks that the attention of the rule-making authority under this Act might perhaps be called to this particular case where there are three persons interested. We do not mean to suggest that in every case where a debtor asks for relief and says he owes money to A, B, C, D, E and F, in addition to the plaintiff, that the whole of those people should be brought before the Court. But in a case such as this where there is the mortgage of a lease and where three people are vitally interested in the matter, namely, the landlord, the tenant and the mortgagees, it might be well that the Court should be able in a proper case to have the mortgagees before it so that all parties interested in the matter can be heard. The Court has to try to do what Scott L.J. has called a certain amount of distributive justice and apportion what the debtor may be able to pay between the various people concerned. In the present case, if the landlord could get nothing it would not, of course, be right that he should be kept at bay entirely while the mortgagees were getting everything. On the other hand, one can see quite well that so far as the debtor is concerned he is vitally interested in the attitude which the mortgagees may take up, and we have no certain knowledge what attitude they will take up. If they do not get paid either the premium on the policy, or the interest on the mortgage, they may take proceedings which may yet have to come before the Court.

The question with which we are concerned is, whether it is right that relief should be given to the defendant in this case; that is to say, whether he should be allowed to keep this house paying only 120*l.* a year off a rental of 500*l.* a year? We do not think that it is right. If there is 340*l.* a year now available it seems to the Court that the person who ought to have that money is the landlord, who has to pay 350*l.* a year, practically the same amount—we need not draw any distinction about the 10*l.* difference—to the Commissioners of Crown Lands, or else he will be liable to a forfeiture of his lease from them. We cannot think that it is right, considering that he has no interest whatever in the mortgage, that the Court should by its order in substance order him to pay out of his pocket 230*l.* a year, for that is what it comes to, in order to keep alive this lease for the benefit of the tenant and of the mortgagees.

We think, therefore, that the proper order to make is that the appeal should be allowed and the order appealed from should be varied by increasing the amount to be paid under the order to the sum of 28*l.* 6*s.* 8*d.* a month, the increase to date from the next payment, which is to be made on April 27 next. Mr. Paget has been instructed not to ask that the payment made in March should be increased, and that is, we think, a generous attitude for the landlord to adopt.

The Court thinks it right to say that in making this order it is only dealing with the matter as it is immediately before it now. The order does not prevent either party from going back to the Court under r. 18 of the Rules and asking for a variation of the order. It does not follow that circumstances may not arise which would justify the Court in reducing that order. Equally it does not follow that in time the Court may not say to the defendant that he cannot be allowed to go on occupying this house without paying a proper rent for it and simply piling up debt to be liquidated hereafter. We express no opinion as to what order is to be or can be made hereafter. All we are dealing with is the matter which is immediately before us, and all we do is to vary the order of the learned judge in Chambers by increasing the sum to be paid per month from 10*l.* to 28*l.* 6*s.* 8*d.*

B. L. A. O'Malley. If in the event of a change of circumstances the defendant should desire to apply for a further variation of the order, it is presumed that he will make his application not to this Court but to the Master.

SLESSER L.J. This Court has determined the present appeal. If either party desires a further variation of the order he must make his application under r. 18 to the appropriate authority, who is the Master.

GODDARD L.J. We want to make it quite clear that if either party should go back to the Master for variation it will, in the opinion of this Court, be then open to the other party to contend that the matter has gone on long enough and must now stop.

Appeal allowed.
Order varied.

Solicitor for appellant : *L. A. Hart.*
Solicitors for respondent : *Ballantyne, Clifford & Co.*

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DORMER AND OTHERS *v.* NEWCASTLE-UPON-TYNE CORPORATION.

Local authority—Street barrier—Statutory power to erect posts and rails —Interference with private rights—Nuisance—Newcastle-upon-Tyne Improvement Act, 1865 (28 *&* 29 *Vict. c. ccl.*), *ss.* 22, 65.

By s. 22 of the Newcastle-upon-Tyne Improvement Act, 1865, the corporation were authorized " to place and maintain in any " street any posts . . . . rails . . . . or other fence, permanent " or temporary for the protection of passengers and traffic, and " for preserving any footway clear from annoyance . . . . "

By s. 65: " Provided always that nothing in this Act shall " authorise the corporation or any lessee of the corporation to do or be party to any act or thing amounting to a nuisance." This section formed one of a group of sections commencing with s. 62, at the side of which were the words in italics " Sewers— " Sanitary arrangements."

The plaintiffs were the owners of a block of offices and shops in a busy street in Newcastle. Between August and December, 1938, the corporation in exercise of the above powers set up a barrier along the edge of the pavement in front of the plaintiffs' premises to prevent persons from crossing the road at that point. The plaintiffs complained that this constituted a nuisance in that their premises were rendered less fit for use and occupation, and they brought this action for an order for the removal of the barrier and for damages.

Wrottesley J. held that the corporation had exercised their powers reasonably under s. 22, but that they were bound under s. 65 to exercise them in such a way as not to invade private rights of property, and that, as they had not done so, the plaintiffs were entitled to the relief asked for. On appeal:—

Held, by the Court of Appeal that s. 22 of the Act of 1865 expressly authorized the corporation to do the acts complained of even though they amounted to a nuisance, and that s. 65 was merely a proviso to a group of sections dealing with sewers and sanitary arrangements, and could not be read as a proviso to s. 22.

Decision of Wrottesley J. [1940] 1 K. B. 586 reversed.

APPEAL from a decision of Wrottesley J. in an action tried without a jury. (1)

The plaintiffs were the owners of, and other persons with equitable interests in, a block of offices and shops on the north side of Blackett Street, Newcastle, known as "Grainger House," of which a substantial part had a frontage to the street, which was a public highway and a busy traffic centre in the city. Just opposite Grainger House two other streets converged and joined Blackett Street. The defendants were the Newcastle-upon-Tyne Corporation.

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(1) [1940] 1 K. B. 586.

On August 16, 1938, the defendants, by their engineers, erected a temporary barrier consisting of ropes and iron posts, along the edge of the pavement in front of Grainger House. After this had remained in position for a considerable time, the barrier was lengthened to the eastward so as to extend not merely along the whole front of Grainger House but also in front of two shops lying to the east of Grainger House. The result of this was to provide a barrier extending from a pedestrian crossing in Blackett Street for a distance of about 138 feet, and terminating at the western end of Grainger House. The object was to provide that persons walking on the pavement on the north side of Blackett Street should either use the crossing or, if they passed that crossing, should be prevented from crossing the road until they had reached a point beyond Grainger House where a further crossing was provided. Corresponding restrictions would thus be placed on movement in the opposite direction. This happened some time before December 2, 1938, when a rope barrier was taken away and replaced by a permanent barrier, consisting of posts and two lines of rails.

The plaintiffs alleged that they had suffered damage in consequence, that Grainger House was rendered less fit for use and occupation, particularly for trading purposes, that they had for a time been unable to let their shop and basement, and were now compelled to let them on less favourable terms. They claimed damages for loss of rent, and a declaration that the defendants had no right to erect the guard rails so as to interfere with their private right of free access to the street, or their public right to cross the pavement in front of their premises. They also claimed a mandatory order and an injunction.

By their defence the defendants admitted the erection of the ropes, posts, and guard rails. They denied that they interfered with the private or public rights of the plaintiffs or that they constituted a nuisance, and they relied on their

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statutory powers under the Newcastle-upon-Tyne Improvement Act, 1865. The defendants further pleaded that if the plaintiffs had suffered damage by reason of the guard rails, it had been caused in the execution by the defendants of their statutory duty, and that the plaintiffs had no cause of action.

By the Newcastle-upon-Tyne Improvement Act, 1865, s. 22: "The corporation may continue, or from time to time "place and maintain, in any street any posts, pillars, rails, "bars, chains, or other fence, permanent or temporary, for "the protection of passengers and traffic, and for preserving "any footway clear from annoyance, and for prevention of "accidents, and may place posts in the carriage-way of any "street so as to make the crossing thereof less dangerous to "passengers, and may place fountains in convenient parts of "the footways or carriage-ways of streets."

This section formed one of a group of sections extending from s. 22 to s. 61, the subject-matter of whose provisions were streets, and at the side of s. 22 the word "Streets" was inserted in italics.

By s. 65: "Provided always, that nothing in this Act shall "authorise the corporation or any lessee of the corporation "to do or be party to any act or thing amounting to a "nuisance."

This section formed one of a group of sections commencing with s. 62 at the side of which were the words in italics, "Sewers—Sanitary arrangements." Sect. 62 dealt with the power to construct sewers. Sect. 63 dealt with power to construct works for the utilization of sewage, and s. 64 dealt with the power to contract for the utilization of sewage.

Wrottesley J. held that while the defendants had exercised their powers reasonably under s. 22 they were bound to exercise them in such a way as not to invade private rights of property contrary to s. 65, and, as they had not done so, that the plaintiffs were entitled to the relief asked.

The defendants appealed. The appeal was heard on April 30, 1940.

Sir William Jowitt K.C. and *G. D. Squibb* (for *Arthur*

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Capewell on war service) for the appellants. The decision of Wrottesley J. was wrong. Sect. 22 of the Newcastle-upon-Tyne Improvement Act, 1865, expressly authorized the corporation to do the acts which are complained of by the plaintiffs. Wrottesley J. has held that the effect of s. 22 has been cut down by s. 65, which provides that nothing in the Act shall authorize the corporation or a lessee of the corporation to do any act amounting to a nuisance. That section commences with the words "Provided always" and is a proviso to the preceding three sections which deal with sewers, and it has no application to the group of sections dealing with streets in which group s. 22 appears. Unless some qualification is placed upon the construction of s. 65 its effect will be to nullify s. 22 altogether, because the acts authorized by that section cannot be carried out without creating a nuisance. So to construe the section would be disrespectful to the Legislature. In s. 103 of the Newcastle-upon-Tyne Improvement Act, 1870 (33 & 34 Vict. c. cxx). After providing that ss. 63 and 64 of the Improvement Act, 1865, shall extend and apply to dry or other manure, soil or filth, the section goes on to provide "but nothing in this "section shall authorise the corporation or any lessee of the "corporation to do or be a party to any act or thing amounting "to a nuisance." This affords a clear indication as to what was meant by s. 65 of the Act of 1865. Sect. 149 of the Public Health Act, 1875, vested all streets which were highways repairable by the inhabitants at large in the urban authority, and authorized that authority to place and keep in repair fences and posts for the safety of foot passengers. The most obvious way to avoid the repugnancy which Wrottesley J. saw in the section would be to read s. 65 as being merely a proviso to the group of sections in the Act commencing with s. 62 dealing with sewers. At the side of s. 62 are the words in italics: "Sewers—Sanitary arrangements." It is stated in Craies on Statute Law, 4th ed., p. 190, that "it "was at one time supposed that Courts of law would not "recognize the division into parts or the headings as sub-"stantive parts of the Act. But they are gradually winning "recognition as a kind of preamble to the enactments which "they precede, limiting or expanding their operation." It is also stated in Maxwell on the Interpretation of Statutes, 8th ed., p. 46, that "the headings prefixed to sections or "sets of sections in some modern statutes are regarded as "preambles to those sections." Holroyd J. pointed out in *Rex* v. *The Inhabitants of Newark-upon-Trent* (1) that the question whether a proviso related to and qualified the immediately preceding provisions only or whether it must be taken as extending to all the preceding matters contained in the statute depended upon its words and import. Mellish L.J. said in *Cohen* v. *South Eastern Ry. Co.* (2): "If some absurdity "or inconvenience followed from holding it to apply to the "whole Act, it might be reasonable to confine the incorporation "to clauses relating to some particular subject-matter."

[They were stopped.]

Cecil Havers K.C. and *C. E. Rochford* for the respondents. The decision of Wrottesley J. in holding that the corporation had infringed the private rights of the plaintiff was correct. The burden lies upon those who allege that an Act of Parliament has taken away private rights of individuals to establish that contention. The Courts will not construe an Act of Parliament as taking away private rights unless there are clear words to that effect in the Act, or it is a necessary implication of the language used in the Act. The language of s. 65 is clear and explicit that nothing in the Act shall be construed as authorizing the corporation to commit a nuisance. That applies to the whole Act.

[CLAUSON L.J. The word "lessee" in s. 65 becomes intelligible if the section is read as a proviso to ss. 63 and 64, but not otherwise.]

What the corporation did in the present case amounted to a nuisance, alternatively it was a private nuisance, and therefore was prohibited by s. 65. It was held by the Court of Appeal in *Vernon* v. *Vestry of St. James, Westminster* (3) that a power given by an Act of Parliament to provide and

(1) (1824) 3 B. & C. 59, 71.
(2) (1877) 2 Ex. Div. 253, 260.
(3) (1880) 16 Ch. D. 449, 470.

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maintain urinals did not empower the vestry to erect one where it would be a nuisance to the owners of adjoining property. Lush L.J. pointed out that some limitation must obviously be put upon the section authorizing their erection. Lord Hatherley L.C. pointed out in *Attorney-General* v. *Leeds Corporation* (1) that the provision in s. 107 of the Towns Improvements Clauses Act, 1847, which provided that "nothing in this Act contained shall be construed to render "lawful any act or omission on the part of any person which "is or but for this Act would be deemed to be a nuisance at "common law" applied to the whole Act, and not to a division or section. A nuisance in s. 65 means an act which amounts to an invasion of a right of property. Sect. 22 of the Act authorizes the construction of something which will constitute a public nuisance, but it does not authorize the construction of something which constitutes a private nuisance. Sect. 22 ought not to be construed as conferring upon the corporation power to do things which will interfere with the rights of private persons. If the corporation can carry out their powers in two ways they must choose that way which will cause the least injury to a private individual. The corporation did not act reasonably in putting up the fence and I ask this Court to differ from the finding of the learned judge in this respect. The fence was put up by some one without the authority of the corporation which subsequently affirmed what had been done. The powers given to the corporation were permissive only and not obligatory. There is no provision in the Act for compensation to individuals who may be injured by the exercise by the corporation of their powers.

Slesser L.J. We need not trouble you, Mr. Squibb.

In this action a claim was made by a number of persons who were interested in premises known as Grainger House, Newcastle, Robert Stanhope Dormer, the personal representatives of Henry Herbert Liddell-Grainger deceased, the Grayton Estate, Ld., and the Newcastle-upon-Tyne Permanent Building Society, against the Lord Mayor, Aldermen and Citizens of the

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(1) (1870) L. R. 5 Ch. 583, 590.

City and County of Newcastle-upon-Tyne. They claimed a declaration that the defendants had "no lawful right to erect "and have no lawful right to maintain guard rails on the "pavement in Blackett Street, Newcastle-upon-Tyne . . . . "so as to interfere with the private rights of the plaintiffs or "any of them to free access to the said street or with the "public rights of the plaintiffs or any of them to an unobstructed "way across the pavement" in front of Grainger House, a mandatory order for the removal of the guard rails, and an injunction restraining the defendants from "erecting or "continuing to erect guard rails in the said street and in front "of Grainger House aforesaid so as to be a nuisance to the "plaintiffs or any of them," and damages.

The facts are that in August, 1938, the defendants, purporting to exercise their powers under s. 22 of the Newcastle-upon-Tyne Improvement Act, 1865, placed guard rails in front of Grainger House in the highway between the pavement and the roadway, which guard rails existed for a distance of about 138 feet. That has been done for the purpose of the protection of passengers and traffic and to render the crossing less dangerous to passengers. It appears from the maps which were before the learned judge, which we have seen, that this is a dangerous crossing in a densely populated part of Newcastle. The fences which have been put up appear, so far as one can judge from the photographs and plans, to be efficacious to canalize the traffic going across the road so that it will not spread throughout this dangerous area.

In answer to the allegation that a nuisance, public or private, has been created by the act of the defendant corporation, the defendant corporation rely upon the powers which they say are given to them under s. 22 of the Newcastle-upon-Tyne Improvement Act, 1865. As the powers which they claim are limited to that section it is necessary to read it in detail. It is as follows: "The corporation may continue, or from "time to time place and maintain, in any street any posts, "pillars, rails, bars, chains or other fence, permanent or "temporary, for the protection of passengers and traffic, and "for preserving any footway clear from annoyance, and for "prevention of accidents, and may place posts in the carriage-"way of any street so as to make the crossing thereof less "dangerous to passengers, and may place fountains in "convenient parts of the footways or carriageways of streets." At the side of that provision there is inserted the word "Streets" in italics, which extends from s. 22 over a considerable number of sections whereby it is clear that streets are the subject-matter of those provisions, actually they extend down to s. 61. A new subject-matter indicated by italics headed "Sewers—Sanitary Arrangements" begins at s. 62.

I entertain no doubt that, had there been nothing more in this Act dealing with this question than s. 22, the corporation in putting up these railings were acting within their powers. It seems to me that the effect of the exercise of those powers must necessarily be to create a situation which would otherwise constitute a nuisance, whether it be public or whether it be private. The maintenance in a street of posts, pillars, rails and fences must constitute an obstruction to the highway and obstruction to those whose property is adjacent to the highway. As Cotton L.J. pointed out in *Vernon* v. *Vestry of St. James, Westminster* (1): "If it could be made out "that such an erection, wherever placed and however guarded, "must of necessity be a nuisance, then it would be true that "the Act of Parliament had authorised a nuisance, and the "Court could not have interfered." The learned judge here has found in addition that this erection did not, in his view, constitute an unreasonable use of the powers of the corporation entitling the Court to interfere. In my view that is the only possible conclusion which could be arrived at in this matter.

It may be that if a local authority do not exercise their powers bona fide, as was indicated in the case of *Goldberg & Son, Ld.* v. *Liverpool Corporation* (2), that the Court would interfere. But when once it is found that the discretion of the corporation to carry out the duties or powers imposed on them under s. 22 has been unimpeachably carried out, then it is for them to decide what is the nature of the post or fence necessary to make the crossing of the street less dangerous to passengers. It follows, therefore, by the nature of the case, as I have said, if the matter ended with the power imposed in s. 22, the powers of the corporation are, albeit they would constitute a nuisance were it not for those powers, expressly authorized by the Legislature, and, being so expressly authorized, the question of the manner of their exercise so as to cause a nuisance scarcely arises.

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(1) 16 Ch. D. 449, 468.

(2) (1900) 82 L. T. 362.

One example, and a very familiar example, of a public nuisance is that of obstructing the highway or making it less commodious for traffic. So also the obstruction of a highway may cause special and peculiar damage to an individual or may create a nuisance in the sense of obstructing some right of access. In all these cases I think that s. 22 has expressly authorized the corporation to do the very matter which is complained of as a nuisance.

But the matter does not end there because reliance is placed by the respondents upon s. 65 of the same private Act. Sect. 65 is in the fasciculi of sections—following the sections dealing with streets—which is indicated, as I have said, by the italicized heading at s. 62 entitled "Sewers—"Sanitary Arrangements." Sects. 62, 63 and 64 respectively deal with the power to construct sewers, the power to construct works for the utilization of sewage, and the power to contract for the utilization of sewage.

Sect. 65, which we have here to consider, is in the following terms: "Provided always, that nothing in this Act shall "authorise the corporation or any lessee of the corporation "to do or be party to any act or thing amounting to a "nuisance." The learned judge, though the matter was not very completely argued before him but was reserved for argument in this appeal, has taken the view that those words properly construed are repugnant to the language of s. 22 in that they are purporting to say that nothing in the Act shall authorize any act or thing amounting to a nuisance, whereas s. 22 by its very nature authorizes many things which would amount to a nuisance. If that view is adopted then I think certain difficulties, which pressed the learned judge might well arise, but in my view there is no such inconsistency or repugnancy when s. 65 is rightly construed. It is to be observed in the first instance that s. 65 operates by way of a proviso. It is a proviso to the group of sections dealing with sewers and sanitary arrangements. It has been said in *Rex* v. *Dibdin* (1) by Fletcher Moulton L.J.: "It sins against "the fundamental rule of construction that a proviso must "be considered with relation to the principal matter to which "it stands as a proviso. It treats it as if it were an "independent enacting clause instead of being dependent on "the main enactment." If the main enactment here be, as I think it is in this matter, an enactment relating to sewers, then it is clear, to my mind, that the proviso is limited to those potential nuisances which may arise out of the exercise of the powers in ss. 62, 63 and 64, which, unlike the powers in s. 22, can be exercised without creating a nuisance.

Another reason for coming to the conclusion that the provision is so limited was indicated by Clauson L.J. in the argument. The proviso is not only directed to the corporation but says: "That nothing in this Act shall authorise the "corporation or any lessee of the corporation to do or be "party to any act or thing amounting to a nuisance." The insertion of the words " any lessee " is very material in dealing with s. 64, which contains the power to contract with other persons for the utilization of sewage and deals with the obligation of disinfecting the sewage and/or leasing any land belonging to the corporation. It brings the lessee immediately within the ambit of this section dealing with the power to contract for the utilization of sewage. It has on the face of it no meaning or relation to the power in s. 22 to set up posts for guarding footways. It is another indication that s. 65 is so limited.

Again, I think it would be wrong to take the view that this s. 65 was anything other than a limitation of the power otherwise given in the sections dealing with sewers if consistent sense can be made of the provision without introducing an absurdity.

(1) [1910] P. 57, 125.

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There are other reasons which argue to the same conclusion. Sect. 160 deals with what are called miscellaneous provisions. One would expect to find there some general enactment applying to all the provisions of the Act, but we find in fact this proviso as to nuisance was not placed there but placed among a number of sections dealing with sewers. Moreover, by s. 187 it is provided that certain sections of the Towns Improvement Clauses Act, 1847, are incorporated with the Act. Many of those provisions (which I need not here deal with) must inevitably, if exercised, cause nuisances, public or private, to the persons whose rights would be invaded by the exercise of the powers dealing with all kinds of matters, sewers, streets, cellar-flaps, buildings, footways, removal of nuisances, and many other things. It would stultify the whole operation of this Act were it to be held that powers, which can only be exercised by causing what at common law would be nuisances, could not be exercised by reason of s. 65, and I, for one, repudiate the suggestion that this Act requires any such absurd interpretation.

There is ample authority for the view that one is entitled to have regard not only to the subject-matter preceding the proviso, but also to the indicia afforded by the arrangement of the sections, and from other indications, as is pointed out, I think correctly, by Craies, in the fourth edition of Statute Law, at page 190: "It was at one time supposed that Courts "of law would not recognise the division into parts or the "headings as substantive parts of the Act. But they are "gradually winning recognition as a kind of preamble to the "enactments which they precede, limiting or explaining their "operation." It is pointed out by the same learned author that the method of grouping sections under headings is comparatively recent, dating from 1850. Before that time, it was usual to preface each distinct portion of the Act by words indicating that the division into sections had no legislative authority. As Mellish L.J. pointed out in *Cohen* v. *South Eastern Ry. Co.* (1): "If some absurdity or inconvenience "followed from holding it to apply to the whole Act, it might

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(1) 2 Ex. Div. 253, 260.

"be reasonable to confine the incorporation to clauses relating "to some particular subject-matter"—which I think is what is asked to be done here.

Finally, on this matter I would cite a passage in *Rex* v. *The Inhabitants of Newark-upon-Trent* (1) to this effect: "Then follows the proviso upon which the present question "arises, and which is printed as part of the second section; "but whether it be printed as part of the second section, or "had been separated from it by the printer, and made into "a third section, can make no difference in the construction "of the statute; for in the construction of a statute, "the question whether a proviso in the whole or in "part relates to, and qualifies, restrains, or operates "upon the immediately preceding provisions only of the "statute, or whether it must be taken to extend in the whole "or in part to all the preceding matters contained in the "statute, must depend, I think, upon its words and import, "and not upon the divisions into sections that may be made, "for convenience of reference in the printed copies of the "statute." Therefore, as I see it, it is a matter of construction, having regard to the context and the mischief, in case of any possible ambiguity, to consider what is the meaning of the proviso. As I have indicated, in my view it is limited to the case of possible nuisances which may arise by persons exercising powers under that part of the Act which is dealing with sewers and sanitary arrangements.

The only other matter which remains for consideration is the distinction which the learned judge, being faced as he thought with an apparent repugnancy and absurdity, sought to make between public and private nuisances. Had s. 65 not got the meaning which I am inclined to attach to it, for myself I see no reason for restricting the word "nuisance" to a private nuisance. It seems to me, if it is to operate so as to forbid a nuisance, there is no reason why we should introduce, by words which are not there, a limit to the type of nuisance to which it would operate. In other words, I think that, strictly applied, if it is to be applied generally

(1) 3 B. & C. 59, 71.

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to s. 22, it would really stultify all those acts done under s. 22, whether they produce a public nuisance or a private nuisance.

The class of case to which the learned judge refers seems to me, with every respect to him, not to be in point here. Those cases are dealing with matters, as was pointed out in *Attorney-General* v. *Leeds Corporation* (1) by Lord Hatherley L.C., which they would be at liberty to do, such as draining into a river without creating a nuisance, or the other cases to which I have referred.

The question may always arise in those classes of cases which have come before the Court, where an authority, being given power by statute to do a thing, has done it in such a way as to injure the property of another, or create a public nuisance; or where it has not acted reasonably. But here the power seems to me to be absolute. In those circumstances, were I to come to the conclusion, which I do not, that s. 65 was to be read with s. 22, I should have come to the conclusion that s. 22, if it produced any nuisance, would, by reason of the wording of s. 65, not be authorized and, therefore, be unlawful; and that unless the corporation could find some way of placing posts, pillars, rails, bars, chains, or other fence in the carriageway or footway which would not constitute a nuisance, they would be acting unlawfully. Directly their acts constitute a nuisance, whether it be public or whether it be private, equally they would be doing something under s. 65 for which they had no authority. I see no reason for distinguishing in this context between public or private nuisance. But in my opinion the question does not arise, because I do not think that s. 65 qualifies in any way the power which the corporation have under s. 22 to set up posts and the like regardless of whether so doing causes a public or private nuisance or not.

For these reasons, I think that this appeal succeeds.

CLAUSON L.J. I am of the same opinion, namely, that s. 65 of the private Act is not to be read as a proviso to s. 22;

(1) L. R. 5 Ch. 583, 593.

and I am content to rest my opinion on the grounds which have been stated by my Lord.

GODDARD L.J. I agree. In justice to the learned judge from whom we are differing, I desire to say that it seems to me that before him the counsel who then represented the defendants did not really put forward, or at any rate insist upon, the point which is really the most complete defence to this action. That does not prevent us from dealing with it as it involves the consideration of and application of an Act of Parliament: and Sir William Jowitt put it in the forefront of his argument.

I think it is beyond argument that s. 65 being, as it purports to be, a proviso, is a proviso only to the sections immediately preceding it dealing with sewers; and was never intended to be applicable to the whole Act. If it be applied to s. 22, it would simply mean that Parliament had given with one hand what it took away with the other. The learned judge, being apparently invited to treat the section as applicable to the whole Act, had to see if he could reconcile the sections; and did so by differentiating between a public and a private nuisance, holding that the section did not authorize a private nuisance, though it did a public nuisance. But I confess that I know of no principle on which this construction could be supported. I need not, however, consider his reasons; because in my opinion it is clear that s. 65 is not a proviso to s. 22.

Then it was sought to be argued that this Court could consider whether the corporation had exercised the powers conferred by the Act reasonably or unreasonably. Apart from the fact that the learned judge has distinctly thought it was a reasonable exercise of the power, let me just consider what the power is. It is a power to place railings, fences, and so forth, in a street to ensure the safety of the public. Of course, if in the exercise, or purported exercise, of that power the corporation put up a close-boarded fence ten or twelve feet high along the edge of the path, if one could imagine any corporation doing such a ridiculous thing as that, it might very well be that the frontagers whose light was

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interfered with could say: "This is not the sort of thing "which Parliament ever intended that you should have the "right to do. It is not an exercise of the powers which have "been given to you; because while you are purporting to "exercise that power, in fact you are doing something entirely "different." But in this case it is merely a question whether or not the railing which the corporation put up, which no one suggests is not a proper railing for the purpose of affording protection to foot passengers, should or should not extend for a particular distance. The plaintiffs do not like it extending in front of their shop. The corporation, in the exercise of their discretion, came to the conclusion that it was necessary for the protection of the public in Newcastle that it should. I do not think that this Court, or any other Court, has any right to canvass the decision of a local authority on a matter of that sort which Parliament has placed in their hands to decide. It is not a question whether the Ministry of Transport, or the police, or the watch committee, or anybody else, took this view or that view. It is a question entirely for the corporation as a corporation to decide: and they having come to a decision with regard to the matter, it is not open, on a matter of that sort, that the length or extent of this fence should be reviewed, by this or any other Court.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for appellants: *Collyer-Bristow & Co., for Town Clerk, Newcastle-upon-Tyne.*

Solicitors for respondents: *Dawson & Co.*

R. F. S.

S. & A. SERVICES, LIMITED *v.* DICKSON.

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May 27;
June 3.

[1940. S. 268.]

Emergency Powers—Hire-purchase agreement—Motor-car—Default in payment under agreement—Order for return of car—Leave to issue writ of delivery—Right exerciseable without leave under Courts (Emergency Powers) Act—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2.

Where the plaintiffs had obtained an order for the return to them of a chattel let on hire upon the default of the defendant in paying instalments of rent becoming due after the commencement of the war, the plaintiffs were entitled to obtain the issue of a writ of delivery under Order XLVIII., r. 1, without obtaining the leave of the Court under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2.

Sub-sect. 2 (*a*) of the Act applies only to prevent a person exercising the remedies there referred to extra-judicially. Thus "the taking possession of any property" referred to in sub-s. 2 (*a*) (ii.) has no reference to an application to the Court to order a sheriff to seize property and hand it to the plaintiffs.

APPEAL from Cassels J.

By a hire-purchase agreement dated April 13, 1939, the plaintiffs, S. & A. Services, Ld., agreed to let to Alfred Thomas Dickson a Morris 10 h.p. saloon on the terms that the hirer paid to the owners the sum of 79*l.* in consideration of the option to purchase the motor-car thereafter contained and that he paid punctually to the owners the monthly rent of 5*l.* 5*s.* 4*d.* for hire of the car, the first payment to be made on May 13, 1939, and the subsequent monthly payments to be made on the 13th day of each successive month. The payments under the agreement were duly made until the beginning of the present war and thereafter the hirer made default in the monthly payments, and on January 22, 1940, the plaintiffs brought proceedings by specially endorsed writ for the return to them of the motor-car and, alternatively, for damages for conversion. On March 15, 1940, an order was made, in default of appearance by the defendant, that the plaintiffs should have return of the motor-car or recover against the defendant damages to be assessed. The plaintiffs then applied for leave under Order XLVIII., r. 1, to issue a

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writ of delivery of possession of the motor-car, and a fiat was made by Master Baker on April 5, 1940, giving the plaintiffs the leave asked.

Subsequently the defendant entered an appearance and applied asking that the plaintiffs should not be permitted to issue a writ of delivery without obtaining leave under the Courts (Emergency Powers) Act, 1939 (1), and obtained leave to apply to have the fiat of Master Baker set aside.

This application was dismissed by Master Burnand and on appeal from him by Cassels J.

The defendant appealed. The appeal was heard on May 27, and judgment given on June 3, 1940.

G. O. Slade for the appellant. On the true construction of s. 1 of the Courts (Emergency Powers) Act, 1939, the leave of the Court is necessary before a writ of delivery can issue. The leave already given by the Court for the issue of the writ was given under Order XLVIII., r. 1, as a matter of course and has nothing to do with any leave under the Act of 1939. Whether that is necessary is a question of construction, and it is contended that it is, under s. 1, sub-s. 2 (*a*) (ii.), which provides that a person shall not be entitled, except with the leave of the appropriate Court " (*a*) to proceed to exercise "any remedy which is available to him by way of . . . . "(ii.) the taking of possession of any property." Property there includes chattels. It will be said that sub-s. 2 (*a*) deals with matters of self-help as opposed to sub-s. 2 (*b*), which refers to the institution of proceedings for foreclosure or for sale in lieu of foreclosure. But if sub-s. 2 (*a*) (ii.) does not include the taking of proceedings to obtain possession of land the initial words of clause (*a*) " proceed to exercise any "remedy" would have read " exercise any remedy." The words " proceed to " include the taking of proceedings. Further, unless sub-s. 2 (*a*) (ii.) included the taking of proceedings the words in the proviso (*d*) to sub-s. 2 would have been otiose. This proviso provides "nothing in this sub-section "shall affect . . . . (*d*) the institution or prosecution of any "proceedings for the appointment by the Court of a receiver "of any property, or for recovery of possession."

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(1) The Courts (Emergency Powers) Act, 1939, s. 1, provides:—

"(1.) Subject to the provisions "of this section, a person shall not "be entitled except with the leave "of the appropriate court, to "proceed to execution on, or "otherwise to the enforcement of, "any judgment or order of any "court . . . . for the payment "or recovery of a sum of money: ". . . ."

"(2.) Subject to the provisions "of this section, a person shall not "be entitled, except with the leave "of the appropriate court—(*a*) to "proceed to exercise any remedy "which is available to him by way "of—(i.) the levying of distress; "(ii.) the taking of possession of "any property or the appointment "of a receiver of any property; "(iii.) re-entry upon any land; "(iv.) the realisation of any "security or the forfeiture of any "deposit; or (v.) the serving of a "demand under paragraph (1.) of "section 169 of the Companies "Act, 1929; or (*b*) to institute any "proceedings for foreclosure or "for sale in lieu of foreclosure, or "take any step in any such proceedings instituted before the "commencement of this Act; "Provided that this sub-section "shall not apply to any remedy "or proceedings available in consequence of any default in the "payment of a debt, or the performance of an obligation, being "a debt or obligation arising by "virtue of a contract made after "the commencement of this Act; "and nothing in this sub-section "shall affect— . . . . (*d*) the "institution or prosecution of any "proceedings for the appointment "by the court of a receiver of any "property, or for the recovery of "possession of land."

[Clauson L.J. The words in (*d*) as to appointing a receiver may well refer to sub-s. 2 (*b*) in connection with foreclosure proceedings.]

That it is a possible explanation of the first part of (*d*), but it is no answer to the argument so far as it is based on the concluding words of (*d*) " or for recovery of possession."

[Scott L.J. The initial contrast between sub-s. 2 (*a*) and sub-s. 2 (*b*), is between " to proceed to exercise a remedy " and " to institute any proceedings."]

" To proceed to exercise a remedy " are words wide enough to cover the bringing of proceedings. It is contended that sub-s. 2 (*a*) applies both to processes of law and self-help. Of the five matters mentioned in sub-s. 2 (*a*), sub-clauses (i.), (iii.) and (v.) are matters of self-help, but sub-clause (ii.) and (iv.) are matters of self-help and legal proceedings, and the initial words of sub-s. 2 (*a*) are wide enough to cover both self-help and legal proceedings.

Melford S. Stevenson for the respondents. There is a distinction between the corresponding provision in the Courts (Emergency Powers) Act, 1914, and s. 1, sub-s. 2, of the 1939 Act, which supports the contention that all the matters mentioned in sub-s. 2 (*a*) of the latter Act are self-help remedies and nothing else. In s. 1 (*b*) of the 1914 Act the same matters are included as now appear in sub-s. 2 (*a*), but with the addition of foreclosure. Foreclosure obviously involves proceedings in Court and that matter is now taken away from sub-s. 2 (*a*) and put into sub-s. 2 (*b*). The question of the meaning of foreclosure in the section of the 1914 Act is discussed in *In re Farnol Eades Irvine & Co., Ld.* (1) The confusion caused in the earlier Act is so avoided. Again the words "exercise "any remedy" refer to personal action and can be contrasted with the words in sub-s. 2 (*b*) "institute any proceedings." It may well be that this construction of the section leaves a gap in the Act, but the words are too clear for any other view to be taken.

G. O. Slade in reply.

Cur. adv. vult.

1940. June 3. The judgment of the Court (SCOTT, CLAUSON and GODDARD L.JJ.) was as follows. The plaintiffs obtained a judgment against the defendant for the delivery up of a motor-car. They obtained that judgment because they were by contract entitled to call upon the defendant in the circumstances which occurred (namely, the failure to make certain agreed payments in respect of the purchase of the car) to deliver over the car to them. Having obtained this judgment the plaintiffs applied to the Court for the issue (to which, save for the applicable provisions, if any, of the Courts (Emergency Powers) Act, 1939, they were entitled ex debito justitiæ) of a writ of delivery. They obtained their order in the usual way ex parte. The defendant thereafter sought to have the ex parte order discharged on the ground that on the true construction of s. 1, sub-s. 2, of the abovementioned Act the Court was precluded from ordering issue

(1) [1915] 1 Ch. 22, 24.

of the writ of delivery save in pursuance of an order obtained under that sub-section, or, to put the matter in different form, that the plaintiffs were precluded from applying to the Court to issue the writ of delivery without first obtaining an order under that sub-section. In this contention the defendant failed before the Master and before the judge, and he appeals to this Court.

The point at issue is accordingly the question of the true meaning of the following words in that sub-section: "A "person shall not be entitled except with the leave of the "appropriate Court—(*a*) to proceed to exercise any remedy "which is available to him by way of . . . . (ii.) the taking of "possession of any property." The appellant argues that when the plaintiffs applied to the Court to order the issue of the writ of execution they were proceeding to exercise a remedy which was available to them by way of taking possession of the car.

In our judgment the words, as a mere matter of English, do not bear the construction which the appellant asks this Court to place on them. To apply to the Court to use its powers to remedy the grievance suffered by the plaintiffs by reason of the defendant retaining possession of the plaintiffs' car without paying for it appears to us to be crucially different from an exercise of a remedy by the plaintiffs themselves. The succeeding words appear to us powerfully to enforce this argument. To ask the Court to order the sheriff to seize the car and deliver it to the plaintiffs is one thing: for the plaintiffs to exercise their remedy by taking possession of the property seems to us to be quite another thing. When the Court has exercised its remedial jurisdiction the plaintiffs will receive possession of the property from the Court's officer: to describe the process under which the plaintiffs receive an article from the Court's officer as a process of taking the article appears to us to be a misuse of language.

But the matter does not stop there. Upon examination of s. 1 of the Act it appears that sub-ss. 1 and 3 are directed to placing control upon a plaintiff who seeks to enforce certain judgments of the character there enumerated: had the

Legislature intended to place control upon a plaintiff who seeks to enforce judgment for delivery of a chattel nothing would have been easier than to include such a judgment among those enumerated in those sub-sections. The Legislature has not done so. Sub-s. 2 (*a*) appears to be directed to a wholly different matter—namely, to placing control upon a person who seeks to exercise certain remedies available to him, such remedies being grouped under five sub-heads: we need not enumerate them: but it is obvious that those numbered (i.), (iii.) and (v.) cannot be otherwise than extra-judicial remedies: we can see no ground for suggesting that that numbered (iv.) is otherwise than extra-judicial: we should expect to find that the remedies numbered as (ii.) namely, "the taking of possession of any property or the "appointment of a receiver of any property," would be extra-judicial remedies and, as we have already implied above, the language is clearly consistent with, and in our judgment consistent only with, those remedies being extra-judicial. Sub-s. 2 (*b*) deals specifically with the institution of proceedings and does not seem to throw further light on the matter.

It was ingeniously argued for the appellant that proviso (*d*) afforded a ground for finding some special implication in the relevant words appearing in sub-s. 2 (*a*). With the greatest respect for an argument of such subtlety that we find it difficult to be sure that we are doing it full justice, we can find no such implication. Proviso (*d*) would appear to be a perfectly clear proviso limiting clause (*b*) of sub-s. 2.

It was pointed out, and perfectly correctly, that as we construe the section a man who is contractually entitled to delivery of a chattel is controlled in regard to his right to seize it himself, but is quite free without any control to obtain a judgment for delivery of the chattel and then actual delivery of it. The result it is said will be that a claimant to a chattel will not seize it himself but will procure it through the machinery of an action. That seems to us to be so. Why the Legislature left the matter in this position it is not for us to inquire if on the enactment itself we can find no difficulty of construction.

The appeal fails, and will be dismissed with costs.

Appeal dismissed.

Solicitors: *Rollit, Sons & Haydon; Goulden, Mesquita & Co.*

H. C. G.

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June 4, 5.

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

Insurance (Motor)—Third-party liability—Policy issued by respondents to cover policyholder—Extension " to indemnify in like manner any " person whilst driving . . . . on the order or with the permission " of the policyholder "—Extended cover subject to the terms, exceptions and conditions of the policy " in so far as they can apply "—Collision —Damages recovered by policyholder against her authorized driver for personal injuries—Claim by authorized driver to be indemnified under policy—Arbitration clause—Availability to authorized driver.

By a policy of insurance the respondents agreed (clause 2 (1.)) to indemnify the policyholder against all sums which the policyholder should become legally liable to pay " in respect of any " claim by any person " (including passengers in the automobile described in the schedule to the policy) for loss of life or accidental bodily injury caused by, through, or in connection with such automobile. The policy also provided (clause 2 (3.)) : " The " insurance under this section [third-party liability] shall also " extend to indemnify in like manner any person whilst driving " . . . . on the order or with the permission of the policyholder, " provided . . . . that such person shall, as though he were the " policyholder, observe, fulfil and be subject to the terms, ' exceptions and conditions of this policy in so far as they can " apply." The policy also contained a condition that any difference arising between the policyholder and the respondents should be referred to arbitration and that " an award shall be " a condition precedent to any liability of the corporation or " any right of action against the corporation."

The policyholder, while being driven in her motor-car by the claimant, her chauffeur, was injured in a collision between her car and another vehicle, and she recovered damages for negligence against the chauffeur. In arbitration proceedings against the respondents the chauffeur claimed to be indemnified under the policy in respect of those damages. The award was in his favour, but by agreement it was stated in the form of a Special Case, raising for the opinion of the Court the following questions : " (1.) Whether, on the facts and in the circumstances, the claimant " is entitled to avail himself of the arbitration provided for in " the policy ; (2.) Whether, on the assumption that he is so " entitled, the claimant is entitled to be indemnified by the " respondents " :—

Held, that the first question should be answered in the affirmative, since, otherwise, an authorized driver would be in a better position under the policy than the policyholder ; but (Luxmoore L.J. dissenting) that the second question should be answered in the negative, since " any person " in clause 2 (1.) meant a third party, i.e., a person not a party to the policy, and, the policyholder not being such a third party, the claimant was not

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entitled to be indemnified against sums which he was liable to pay in respect of a claim by her.

Decision of Atkinson J. [1940] 1 K. B. 643 reversed on second point.

Appeal from Atkinson J. (1)

By a policy of insurance dated October 27, 1936, issued by the respondents, the General Accident, Fire and Life Assurance Corporation, Ld., it was provided that "in "consideration of the payment to the corporation of the "premium . . . . the corporation will, subject to the terms, "exceptions and conditions contained herein, and of any "endorsement hereon, indemnify the policyholder [Estelle "Merle O'Brien Thompson] in respect of any automobile "described in the schedule [a Buick limousine] against . . . . "Clause 2 (Third Party Liability). (1.) All sums which "the policyholder shall become legally liable to pay in respect "of any claim by any person (including passengers in the "automobile) for loss of life or accidental bodily injury or "damage to property (including animals) caused by, through or "in connection with such automobile. . . . ." By clause 2 (3.): "The insurance under this section shall also extend to "indemnify in like manner any person whilst driving any "automobile described in the schedule hereto on the order "or with the permission of the policyholder, provided there is "no other insurance subsisting under which such person "may be indemnified, and that such person shall, as though "he were the policyholder, observe, fulfil and be subject to the "terms, exceptions and conditions of this policy in so far as they "can apply. . . . ." By condition 8: "If any difference shall arise "between the policyholder and the corporation, such difference "shall be referred with all usual powers to two arbitrators "mutually chosen, or their umpire, or to one arbitrator if the "policyholder and the corporation shall so agree, and an award "shall be a condition precedent to any liability of the "corporation or any right of action against the corporation."

While the policy was in force, namely, on March 16, 1937, the claimant, Sidney James Digby, who was employed as chauffeur by Miss Thompson, was driving her in the motor-car described in the schedule to the policy when a collision occurred with another car, and Miss Thompson received personal injuries. On May 4, 1938, judgment was entered in an action in the King's Bench Division for negligence in favour of Miss Thompson against Digby for 5000*l*. damages and costs agreed at 693*l*.

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(1) [1940] 1 K. B. 643.

On October 25, 1938, the claimant began an action against the respondents claiming as an authorized driver to be indemnified under the policy against the judgment of May 4, 1938. The respondents pleaded in their defence (inter alia) that if the claimant could in law take proceedings against them under or in respect of the policy, which they denied, such proceedings could only be by way of arbitration. The action was stayed and arbitration proceedings were begun. The umpire made an award in the form of a Special Case in favour of the claimant, subject to the following questions, which by agreement between the parties he stated for the opinion of the Court, being answered affirmatively: (1.) Whether, on the facts and in the circumstances, the claimant was entitled to avail himself of the arbitration provided for in the policy; and (2.) whether, on the assumption that he was so entitled, he was entitled to be indemnified by the respondents and to recover from them the 5693*l*.

On the hearing of the Special Case Atkinson J. answered both questions in the affirmative and the respondents appealed.

H. U. Willink K.C. (*Montague Berryman* with him) for the respondents. As to the first question, the parties agreed that the arbitrators and umpire should have jurisdiction to determine the question whether there was any valid submission. It is submitted that there was no such submission since the authorized driver was not a party to the contract and could not have claimed in his own name except for the Road Traffic Act, 1930, s. 36, sub-s. 4.

[LUXMOORE L.J. Are you not estopped as to that, having set up in the defence to the action begun by the claimant that he should have gone to arbitration? He thereupon got his action stayed and paid your costs.]

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There is no estoppel. A pleading is not a representation of fact, and the claimant suffered no consequence of the respondents' action except those of his own act in accepting the respondents' view of the law (which they afterwards decided was wrong) and staying his action. The arbitration clause contained in condition 8 can, in the absence of explicit language, no more be said to apply to the extension of the insurance to the authorized driver under clause 2 (3.) than could the arbitration clauses in the charterparties in *Hamilton & Co.* v. *Mackie & Sons* (1), followed in *Thomas (T. W.) & Co.* v. *Portsea Steamship Co., Ld.* (2), be incorporated in the respective bills of lading. The claimant, therefore, was not entitled to avail himself of the arbitration provided.

On the second question, the respondents have an almost identical policy in use in Scotland and Lord Robertson has held on that policy that the assured cannot be a third party: *General Accident, Fire and Life Assurance Corporation* v. *Watson.* (3) [He referred to the insurance sections of the Road Traffic Act, 1930, and in particular to s. 36, sub-s. 4, and cited *McCormick* v. *National Motor and Accident Insurance Union, Ld.* (4); *Guardian Assurance Co., Ld.* v. *Sutherland* (5); and *Tattersall* v. *Drysdale* (6); and continued :] In any case, however, on the construction of the policy the claimant is not entitled to recover. He seeks to do so under clause 2 (1.), the indemnity in which, he says, is extended to him by clause 2 (3.). He contends that by clause 2 (1.) he, standing in the shoes of the policyholder, is entitled to be indemnified against the consequences of "any claim by any person," words which, it is said, are wide enough to include a claim by Miss Thompson, the policyholder herself. Admitting, however, that he is entitled to the same indemnity as Miss Thompson, that cannot extend to a claim by Miss Thompson, for Miss Thompson could not bring a claim against herself. The indemnities given by the policy to the policyholder and the

(1) (1889) 5 Times L. R. 677.
(2) [1912] A. C. 1.
(3) (Mar. 11, 1938): Unrep.
(4) (1934) 40 Com. Cas. 76; 50 Times L. R. 528.
(5) [1939] W. N. 122; 55 Times L. R. 576.
(6) [1935] 2 K. B. 174.

claimant are against third-party liability and a party to a policy cannot be a third-party: *Royal London Mutual Insurance Society, Ld.* v. *Barrett.* (1)

H. D. Samuels K.C. (*Armstrong-Jones* with him) for the claimant [on the second point only]. The claimant is entitled to recover. By clause 2 (3.) of the policy the insurance given to the policyholder is to extend to indemnify an authorized driver "in "like manner" as the policyholder. The manner in which the policyholder is to be indemnified is defined in clause 2 (1.) as being against " all sums which the policyholder shall become "legally liable to pay in respect of any claim by any person "(including passengers in the automobile)." No words could be wider than " any claim by any person " and, where an authorized driver is seeking to enforce his indemnity under the policy, they are clearly wide enough to include a claim by the policyholder. Indeed, for the purpose of the claim by the authorized driver, which is between the authorized driver and the insurer, the policyholder being a stranger to it, the policyholder is in substance and effect a third party. There is nothing to distinguish her position from the passing pedestrian who is injured in the street or a friend of her's who is injured while a passenger in the car. In truth, there are two indemnities here, one to the policyholder in clause 2 (1.), and the other to the authorized driver in clause 2 (3.). The insurers are parties to both indemnities, but the policyholder and the authorized driver is only a party to that indemnity with which, by the terms of the policy, he or she is concerned. *General Accident, Fire and Life Assurance Corporation* v. *Watson* (2) is distinguishable, the terms of the policy there being considered being substantially different from those of the policy in the present case.

H. U. Willink K.C. replied.

MacKinnon L.J. [after stating the facts :] As regards the first question submitted to the Court, I agree with the decision of the umpire and of Atkinson J., that an authorized driver claiming under clause 2 (3.) of this policy is subject to

(1) [1928] Ch. 411.

(1) (Mar. 11, 1938) : Unrep.

condition 8, and must have an award in an arbitration before he has any right of action against the respondents. The promise of indemnity to an authorized driver in clause 2 (3.) is subject to the provision that that driver " shall, as though he "were the policyholder, observe, fulfil and be subject to the "terms, exceptions and conditions of this policy in so far as they "can apply." One of the conditions is No. 8. I think that it is clear almost beyond argument that the terms of that condition can apply to a claim made by an authorized driver under clause 2 (3.), and that the words at the end of the condition that " an award shall be a condition precedent to any liability "of the corporation or any right of action against the "corporation " emphasize that the authorized driver claiming under clause 2 (3.) must get an award as a condition precedent to his bringing any action. The result is that, on the first question, I think that the judgment of Atkinson J. is right. Despite the strenuous argument of Mr. Willink to the contrary, it will, I hope, be a satisfaction to the corporation to know that their pleading in the action that an action did not lie was not mere bluff, but was a plea which the claimant was right in thinking was an insuperable obstacle. Mr. Willink relied on certain cases in which was raised the question whether an arbitration clause in a charterparty was incorporated in a bill of lading, but any decision on the construction of a contract so totally different from the present one as a bill of lading or a charterparty seems to me to be of no value whatever.

That the second point is much more difficult is manifest when I say that there is a difference of opinion among the members of the Court. I have come to the clear conclusion that on this question the decision of Atkinson J. was not correct.

Clause 2, which deals with third-party liability, is obviously inserted in the policy by reason of the necessity to have that type of insurance imposed on any owner of a motor-car by s. 35 of the Road Traffic Act, 1930. The whole argument for the claimant rests on the fact that in the operative part of clause 2 (1.) the words "any person " are used instead of "a third party," but, in my view, construing the policy

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as a whole and having regard to its purpose and nature and to the fact that this part of it is obviously based on the requirements of s. 35 of the Act of 1930, "any person" in this sentence means "a third party" and the passage ought to be construed as though the words "a third party" appeared there instead of "any person." This is a commercial document. The nature and purpose of such a commercial document are of paramount importance in the construction of any part of it. It must be construed as a whole, and I think it would be erroneous to construe any single sentence in it with that rigorous exactness which in so many cases has for so long defeated the intentions of testators.

If I am right in thinking that "any person" in clause 2 (1.) means "a third party," what is a third party? The phrase clearly contemplates three persons. Equally clearly, I think, the first of them must be the company; the second, the policyholder or the assured; and the third, some person other than the company and the assured. We have had the assistance of an opinion of Lord Robertson in a proceeding in Scotland which I gather is the equivalent of our originating summons. The exact question which is now before us arose before Lord Robertson, although on a policy expressed in slightly different language. Lord Robertson came to the conclusion that the authorized driver could not claim indemnity in respect of his liability to the policyholder who had been injured by his driving of the car. The difference between the wording of the policies in that case and in this is, I think, quite negligible. The substance and the true intent of the two policies were the same. It is not clear to me whether Atkinson J. did not agree with Lord Robertson's opinion, or whether he distinguished the two cases on the ground of the difference of the language in the policies. As I have said, I do not think that there was any difference of any substance in that language, and, in my view, the reasoning of Lord Robertson would apply equally in the present case. I confess that I prefer the opinion of Lord Robertson to that which was expressed by Atkinson J.

If the claimant is right in his suggested construction that there may be a claim by a chauffeur in respect of his liability for injuring his employer by his negligent driving, the most startling results would follow under this policy. I will mention one or two of them. This policy covers in clause 1 loss or damage to the insured car, and in clause 2 third-party liability. It is only the insurance under clause 2 which the owner of a motor-car is bound to possess under the Act of 1930. He would comply with the requirements of the law if he took out an insurance only against third-party liability. The corporation would doubtless grant such a policy, presumably at a smaller premium than if both classes of insurance were included. Having got a policy in those terms, if the assured were careful never to drive himself, but always to be driven by a chauffeur, he would get an indemnity for loss or damage to the car without paying any premium for it. If an accident occurred by a collision with another car, that accident would be due either to the negligence of his own chauffeur or to the negligence of the driver of the other car. If it were the negligence of the driver of the other car he would get compensation for the damage to his car from the other car-owner. If it were due to his own chauffeur's negligence, he could sue the chauffeur and recover against him, in which case the chauffeur could claim to be indemnified by the corporation for that which he had had to pay to his employer. It is true that the corporation, if faced with that claim, might say that they were not liable by reason of the proviso in the policy which provides " that the corporation shall not be "liable in respect of . . . . damage to property belonging "to or held in trust by or in the custody or control of the "policyholder or any member of his family or his house-"hold . . . . ," but I think the reply to that contention, even if the car could be said to be property belonging to the policyholder, would be : " This is a claim, not for damage to "property, but for indemnity against a liability."

That is one remarkable result. Another equally remarkable result is this. Clause 3 of the policy promises to the policyholder certain limited amounts of compensation in the event of accidental bodily injury suffered by the policyholder, for instance, 2500 dollars for the loss of both eyes, while clause 4 covers medical or surgical expenses incurred by the policyholder, limited to 100 dollars in respect of any one accident. If a policyholder, by the negligence of his chauffeur has suffered the loss of two eyes and has incurred medical expenses, he can at once claim against the corporation 2600 dollars. If he then brought an action against the chauffeur and recovered damages, the damages awarded against the chauffeur might amount to thousands of pounds for the loss of the two eyes and hundreds of pounds, if they had been incurred, in respect of medical or surgical expenses. Then the chauffeur would be entitled under clause 2 (3.) to claim the whole of those amounts from the corporation, who, so far as I can see, would have no defence, although they had already paid the policyholder what they had promised to pay him under the policy, namely, 2600 dollars. There is no legal ground on which they could be allowed to set off the sums already paid. Those illustrations, I think, equally assist in showing that "any person" in clause 2 (1.) means a real third party.

There is one other consideration based on the whole business effect of this policy. If, under clause 2, the policyholder is to be entitled to recover indirectly from the corporation damages which he has been awarded against his own chauffeur, there would be—I am not suggesting for a moment that it happened in this case—the gravest danger of the chauffeur deliberately admitting acts of negligence in his evidence in a collusive action.

In the result the first question stated for the opinion of the Court by the umpire must be answered in the affirmative, but the second question should be answered in the negative.

LUXMOORE L.J. [after stating the facts:] The answer to both the questions submitted to the Court depends, in my judgment, solely on what is the true construction of the contract of insurance, it being conceded that, although the claimant is not a party to that contract, he has, by s. 36, sub-s. 4, of the Road Traffic Act, 1930, as a person for whom indemnity is provided under Miss Thompson's contract of insurance, a statutory right to enforce that indemnity against the insurance company as if he had been a party to it. It is admitted that the claimant, as a person authorized by the policyholder to drive the motor-car mentioned in the contract of insurance, is a person specified in the policy in respect of a liability which the policy purports to cover, although no admission is made as to the extent of the liability.

The claimant cannot either avail himself of arbitration proceedings or be compelled to submit to them unless the contract of insurance so provides. The policy provides that the insurance company "will, subject to the terms, exceptions "and conditions contained herein, and of any endorsement "hereon, indemnify the policyholder in respect of any "automobile described in the schedule" against (*a*) loss or damage thereto, to the extent stated in clause 1 of the policy; (*b*) third-party liability as stated in clause 2; and (*c*) accidents to the policyholder and other matters. It is sufficient for the purpose of considering the first question to state that the clause dealing with third-party liability is divided into three sub-clauses. By sub-clause (1.) the policyholder is to be indemnified in respect of all sums which the policyholder "shall become legally liable to pay in respect of any claim "by any person (including passengers in the automobile)" in respect of the matters specified in the sub-clause. Sub-clause (2.) extends the policyholder's indemnity to liabilities incurred while personally driving a motor-car not belonging to her as there specified, and sub-clause (3.) provides that "the "insurance under this section shall also extend to indemnify "in like manner any person whilst driving any automobile "described in the schedule hereto on the order or with the "permission of the policyholder, provided . . . . that such "person" (to whom I will refer hereafter as an "authorized "driver") "shall, as though he were the policyholder, observe, "fulfil and be subject to the terms, exceptions and conditions "of this policy in so far as they can apply," subject to certain provisions which need not be stated. The words which I have just quoted are repeated at the end of the section with reference to the personal representatives of any person entitled to indemnity under it.

The policy includes certain conditions, of which the material condition is No. 8, which is as follows: "If any difference "shall arise between the policyholder and the corporation, "such difference shall be referred with all usual powers to "two arbitrators mutually chosen, or their umpire, or to "one arbitrator if the policyholder and the corporation shall "so agree, and an award shall be a condition precedent "to any liability of the corporation or any right of action "against the corporation." It is said that condition 8 cannot apply to an authorized driver entitled to indemnity under clause 2 (3.) because there is no mention in the condition of any persons other than the policyholder and the insurance company. It is to be observed that there is placed on an authorized driver by clause 2 (3.) an obligation to "observe, "fulfil and be subject to the terms, exceptions and conditions "of this policy in so far as they can apply" as though he [the authorized driver] were the policyholder. Plainly, the policyholder cannot, in case of difference between himself and the insurance company, recover anything unless an award shall first have been made in arbitration proceedings under condition 8. That is both a term and a condition of the policy. If the authorized driver is to be treated as though he were the policyholder, there is no difficulty in substituting "the authorized driver" in the condition for "the policy-"holder." The limitation to arbitration proceedings of the policyholder's right of action in the first instance is a subtraction from the policyholder's right to have recourse to the Court and it would be strange if an authorized driver were not subjected to the same limitation.

I think, however, that any possibility of doubt with regard to the availability of arbitration proceedings to an authorized driver is completely dispelled by the generality of the last words of condition 8, namely, "An award shall be a condition "precedent to any liability of the corporation or any right "of action against the corporation." If it had been intended to restrict the availability of arbitration proceedings to the policyholder, one would expect that the appropriate words would have been inserted. Moreover, in considering this clause, the Court is entitled to bear in mind that the insertion of an arbitration clause in insurance contracts is required by the insurance company and not by the policyholder.

Mr. Willink referred in particular to *Hamilton & Co.* v. *Mackie & Sons* (1) and *Thomas (T. W.) & Co.* v. *Portsea Steamship Co., Ld.* (2), but those cases have no real bearing on the construction of this policy—the material matter to be considered in arriving at a conclusion on the first question. I agree that the first question should be answered in the affirmative.

I regret, however, that I am unable to agree with my brethren on the answer to be given to the second question. On that question I find myself in agreement with the finding of the umpire and the judgment of Atkinson J. Again the answer to the question depends purely on the construction of the material part of the policy. When I say "the material part "of the policy" I, of course, mean the material part as construed in the light of the whole of the policy, because the whole of the policy has to be considered in arriving at any solution on a question of the true construction of any part of it. It is common ground that the claimant was authorized by Miss Thompson to drive her motor-car and that, while he was doing so, he incurred a legal liability to Miss Thompson. Why is he not entitled to be indemnified by the insurance company in respect of that liability? By clause 2 (I.) the policyholder is to be indemnified by the insurance company in respect of "*all* sums which the policyholder shall become "legally liable to pay in respect of *any* claim by *any* person "(including passengers in the automobile)." The italics are mine. It seems to me that this clause can properly be described as being an indemnity in respect of third-party claims. The words "any person," if taken alone, include the whole world. The only limitation on them is that the person in question must have a legal claim against the policyholder and by reason of this limitation the policyholder is herself excluded.

(1) 5 Times L. R. 677.

(2) [1912] A. C. 1.

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The words "any claim by any person" are not synonymous with "any claim by any third party," but are, with the limiting words which I have read, the definition, for the purposes of the policy, of the words "third-party liability" in the margin of the policy. It is to be observed that the words "any person" appear frequently in this policy, and that in one place, at any rate (proviso (*a*) to clause 2), it was thought necessary to add the words "other than the policy-"holder" to prevent their being taken to include the policyholder. Quite plainly in the last paragraph of clause 2 (3.) the words "any person" include the policyholder, for it is in that paragraph that the indemnity given to, among others, the policyholder, is extended to his legal personal representatives in the case of his death.

As I read clause 2 (3.), the authorized driver is to be indemnified in like manner as the policyholder under clause 2 (1.). This appears to be equivalent to a direction to substitute the authorized driver for the policyholder in sub-clause (1.), and, if this is done, the indemnity conferred on the authorized driver is in respect of "all sums which the "authorized driver shall become legally liable to pay in respect "of any claim by any person (including passengers in the "automobile)." It seems to me that the policy provides two separate indemnities—the one for the policyholder and the other for the authorized driver—and that each indemnity is to be co-extensive and is to cover any legal liability to pay any sums in respect of any claim by any person. There is, in my opinion, no exception in the case of an authorized driver of any legal liability under which he may be to the policyholder, and I can find no justification for reading the words "any person" as synonymous with "third party" to exclude the authorized driver's legal liability to the policyholder which admittedly exists by construing the words "third party" with reference to the contract of insurance and not with reference to the particular indemnity to which the words relate.

Reliance was placed on a decision of the Scottish Courts on a policy issued by the respondent corporation which was in a different form from that of the policy in the present case: *General Accident, Fire and Life Assurance Corporation, Ld.* v. *Watson.* (1) The main difference between the policy in that case and that in the present is that in the Scottish policy the words conferring the indemnity on the authorized driver were introduced by the words: "In terms of and subject to the "limitations of and for the purposes of this section." Atkinson J., I think, sought to distinguish the two cases by the presence of those words. Personally, although I feel some considerable doubt about their precise meaning, I do not think that they are sufficiently different for that result to follow. If, as I think, they are not sufficient, I find myself unable to agree with Lord Robertson's decision. In my judgment, Atkinson J. answered the second question correctly when answering it in the affirmative. I need hardly say that I express this opinion with some hesitation, having regard to the fact that my brethren take the contrary view, but I would dismiss the appeal with costs.

GODDARD L.J. On the first point which the special case raises I am of the same opinion as my Lords and Atkinson J. and I need add nothing except to express some surprise and regret that, in view of the plea which they raised in the action, an insurance company with any regard for its reputation should have thought fit to take it in the arbitration.

On the second point, I am in complete agreement with MacKinnon L.J. To arrive at a true construction of this policy one must look at the document as a whole and have regard to what I may call its structure. Clause 2 insures the policyholder against third-party claims, that is, claims which arise as a result of the negligent driving of the car by the assured, including claims arising while she was being driven in the car by her servant. Apart from the extension clause, it is clear that she would get no indemnity in respect of personal injuries which she received through her own or her servant's driving other than what is given for specific injuries by clause 3 of the policy. In my opinion, the clause

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(1) (Mar. 11, 1938): Unrep.

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which we have to construe does not have the effect of granting a separate insurance to an authorized driver, but it extends the cover granted to the assured to a person whom she allows to drive the car although not on her behalf or for her purposes. It enables her to lend the car without committing a breach of the provisions of that part of the Road Traffic Act, 1930, which deals with insurance against third-party risks. Taking the policy as a whole, I think it is impossible so to construe it as in effect to give or award an additional benefit to the policyholder, for that is what it comes to as is here contended. Although by clause 3 compensation to the policyholder for personal injury is limited to specific sums for specific injuries, the result of the contention put forward by the claimant would be that, if the car were being driven by her servant or friend when an accident happened, she would get from the insurance company not only such of those specific sums as were applicable, but all the damages, including medical expenses, which again are limited in amount in the policy, which she might be awarded by the simple expedient of suing the driver. That construction would cast on the insurance company a far heavier obligation than the policy, taken as a whole, ever, in my opinion, contemplated. In this respect I must call attention to the words of Viscount Sumner in *Lake* v. *Simmons* (1): " Every one must agree that commercial contracts are to be interpreted with regard to the "circumstances of commerce with which they deal, the "language used by those who are parties to them, and "the objects which they are intended to secure." In my opinion, when this test is applied, the result points irresistibly to the conclusion contended for by the insurance company.

I can see no difference in substance between the policy in this case and that which Lord Robertson had to consider in the Court of Session: *General Accident, Fire and Life Assurance Corporation, Ld.* v. *Watson.* (2) The same arguments appear to have been adduced before him as here, especially as to the meaning to be given to the words " any person."

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(1) [1927] A. C. 487, 509.

(2) (Mar. 11, 1938): Unrep.

I find his reasoning rejecting the claim quite convincing, and I do not feel I can add anything to them.

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First question answered in affirmative; Second question in negative.

Solicitors for respondent corporation: *Kenneth Brown, Baker, Baker.*

Solicitors for claimant: *Walter, Burgis & Co.*

G. F. L. B.

1940
April 18, 19;
May 10.

THE KING *v.* COMMISSIONERS OF INLAND REVENUE.

Ex parte GIBBS AND OTHERS.

Revenue—Income tax—Partnership—Taking of additional partner—Cesser of business of old partnership and succession thereto of new partnership—Adjustment of assessment—" Person "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 9.

By r. 9, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, if a person charged under Sch. D ceases within the year of assessment to carry on the trade, etc., in respect of which the assessment is made and is succeeded by another person, then by r. 9, sub-r. 2, the Commissioners shall adjust the assessment as directed.

A partnership of four stockbrokers took in a fifth partner, and thereafter continued to carry on business as stockbrokers :—

Held, that a partnership is a " person " within the above rule.

Held, further, that, within the meaning of the rule, the four partners, on taking in the fifth, ceased to carry on the business and were succeeded by the partnership of five.

Hence, the Commissioners had jurisdiction to adjust an assessment made on the partnership of four and charge the partnership of five with a fair proportion of the assessment from the time that partnership came into being.

APPLICATION for leave to issue a writ of prohibition to prohibit the Commissioners for the General Purposes of the Income Tax for the City of London from adjusting an assessment to income tax on the firm of Sir R. W. Carden & Co., stock and share brokers, made on them under Case I. of Sch. D.

On November 5, 1937, the assessment was made on the firm, the partners in which were then four of the applicants, A. Gibbs, B. N. Gibbs, F. L. J. Rogerson and J. Moffat. On February 7, 1938, these four partners took into partnership the fifth applicant, D. E. West. No notice requiring a fresh computation under the proviso to r. 11, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D, as amended by s. 32, sub-s. 1, of the Finance Act, 1926, was then given. The question for decision was whether, when D. E. West was taken into partnership, the partners assessed ceased within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment was made and were succeeded therein by another " person " within the meaning of r. 9 of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918. (1)

Cyril King K.C. and *Frederick Grant* for the applicants.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Surveyor of Taxes for the City of London.

J. S. Scrimgeour for the City Commissioners.

Cur. adv. vult.

1940. May 10. CHARLES J. read the judgment of the Court (HAWKE, CHARLES, and HILBERY JJ.), in which he stated the facts, and continued: The grounds on which the Court was asked for the order of prohibition was that r. 9, sub-r. 1, had no application to the particular circumstances of this case inasmuch as, on the admission of Donald Ernest West to be a partner in the firm of Sir R. W. Carden & Co. on February 7, 1937, no person charged under Sch. D ceased to carry on the trade in respect of which the assessment was made or was succeeded therein by another person, and therefore the surveyor of taxes had no power or authority to certify to the Commissioners under r. 9 and the Commissioners had no jurisdiction to adjust the assessment under the rule.

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Rules applicable to Cases I. and II. Rule 9: " (1.) If a person charged "under this Schedule ceases within "the year of assessment to carry "on the trade, profession, or "vocation in respect of which the "assessment is made, and is "succeeded therein by another "person, the surveyor shall . . . . "certify to the general commis- "sioners for the division in which "the assessment is made the par- "ticulars thereof, and the full "name and residence of the person "charged and of his successor ". . . ."

"(2.) On receipt of the certifi- "cate the commissioners . . . . "after examination of the said "persons, if they attend, or on "other satisfactory proof of the "facts . . . . shall adjust the "assessment by charging the suc- "cessor with a fair proportion "thereof from the time of his "succeeding to the trade, profes- "sion, or vocation, and relieving "the person originally charged "from a like amount."

The short point for determination is whether, when D. E. West was taken into the partnership, the persons charged under the schedule ceased within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment was made and were succeeded therein by another "person" within the meaning of r. 9, sub-r. 1. If there was no cessation and succession within r. 9, sub-r. 1, then the certificate of the surveyor, on which the Commissioners proposed to hear and determine the appropriate adjustment of the assessment in question, was not lawfully given and the Commissioners would have no power to act thereon as they proposed to do under r. 9, sub-r. 2.

It was argued that r. 9, sub-r. 1, had no application to the circumstances because the trade carried on after the admission of Mr. West as a new partner was the same trade, and the firm carrying on that trade was not succeeded by another "person" since a partnership under the rules is not treated as a "person." We are of opinion that r. 9, sub-r. 1, is applicable in the circumstances of the case. It must be read alongside and in conjunction with rr. 10 and 11, but an examination of rr. 10 and 11 leads one to the conclusion that those rules are devised to deal with the computation or the quantum of the assessment on a partnership business and not with its apportionment as between persons who carry on the business in partnership.

If the old r. 11 for which the present r. 11 was substituted is examined, it will be observed that in the case where a succession occurred the quantum of assessment remained the same unless the successor proved a diminution of profits. The new r. 11, sub-r. 2, specifically dealing with the case where a succession occurs, provides that in such a case the assessment shall be made as if at the date of the succession the old trade was discontinued and a new trade was set up. But when one turns to the proviso to r. 11, sub-r. 1, where one would expect to find provision made for apportionment in the case of a partnership admitting a new partner (one of the cases specifically mentioned in r. 11, sub-r. 1), no provision or machinery for apportionment is to be found. The proviso in such circumstances only gives a right to all the persons who were engaged in the trade both immediately before and immediately after the change, by notice signed by all of them, to require a fresh computation as if the trade had been discontinued at the date of the change and a new trade had been then set up. If r. 9, sub-r. 1, already provides for apportionment in such a case there is good reason for making that which is now to be found under r. 11, sub-r. 1, in form a proviso and a proviso to r. 11, sub-r. 1. Unless, however, r. 9, sub-r. 1, is applicable in such circumstances, one would hardly expect this proviso and no machinery to ensure an apportionment in such circumstances as those in the present case.

Such a case as the present becomes casus omissus unless r. 9 provides the necessary machinery. In the first place r. 9 is the rule which deals with the persons who have to pay and the adjustment of the assessment among the persons who have to pay and not with the computation or quantum of the assessment. It assumes an assessment and purports to provide the machinery for apportioning it as between a successor and a person succeeded. Unless, therefore, this rule cannot be applicable, as a matter of construction, to a partnership firm, and the circumstance of a partnership firm taking a new partner during the year of assessment, it is the rule to be applied.

If, as the Interpretation Act, 1889, provides by s. 1, sub-s. 1 (*b*), and it is conceded, the singular in r. 9 includes the plural, the difficulty in applying the rule where a partnership takes in a new partner in the year of assessment does not seem to present any insuperable difficulty. The rule might then be read in reference to the circumstances of the present case as follows : " If four persons charged under this schedule "cease within the year of assessment to carry on the trade in "respect of which the assessment is made and are succeeded "therein by five persons," etc. The rule read thus would immediately become applicable, provided it is right to say that, when the new partner was taken in, the four who carried on the trade or business previously ceased to carry on the trade or business which was the subject of the assessment. Now that which was the subject of the assessment was the profit which resulted from the trading together of those four partners as a firm, but the profit which is made after the new partner is taken in is the profit made by the five partners trading as a firm composed of five.

It was conceded on behalf of the applicants that where a new partnership is constituted by the taking in of a new partner the law regards the identity of the old firm as destroyed. The body of four partners whose trading together would have produced the quantum which was the subject of the assessment has ceased to trade as a trading body and a new body of five has become the body trading to produce the cumulus of profit the subject of the assessment.

There would seem, therefore, in such circumstances, to be a cessation of that trade which was carried on by the old firm and which was the subject of the assessment, at the date when the new partner is taken in, and also a succession by five to that which was previously the product of the trading by four. If this is so, r. 9, sub-r. 1, is applicable.

One other matter is worthy of observation. Rule 1 of Sch. D provides that the tax under this schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing (ii.) to "any person" residing in the United Kingdom from any trade, etc. The expression "any person" there must be used to include persons carrying on business in partnership for there are no other words under which partnership trading profits are taxed under Sch. D.

For these reasons we think that this application should be refused.

Application refused.

Solicitors for applicants: *Janson, Cobb, Pearson & Co.*

Solicitor for City Surveyor and Commissioners: *Solicitor of Inland Revenue.*

W. L. L. B.

THE KING *v.* ELECTRICITY COMMISSIONERS.

Ex parte CHESTER CORPORATION.

1940
May 21, 22.

Electricity — Generating station — Extension — Consent of Electricity Commissioners—Refusal—Jurisdiction of Commissioners—Electricity (Supply) Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 46), *s.* 13 (*a*)—*Electricity (Supply) Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 51), *s.* 18, *sub-s.* 2.

Sect. 13 (*a*) of the Electricity (Supply) Act, 1922, provides that the Electricity Commissioners shall not refuse their consent to the establishment of a new, or the extension of an existing, generating station by any authorized undertakers if it is proved to their satisfaction that, having regard to all the circumstances of the case, the undertakers are or will, if the consent be given, be in a position to give a supply of electricity adequate in quantity and regularity to meet present and prospective demands of their consumers at a cost not greater than that at which they could give a supply if they obtained a supply of electricity from some other available source designated by the Commissioners . . . . unless the Commissioners determine that such refusal or requirement is necessary in the interest of the general supply in the district, whether provisionally or finally determined under the principal Act.

By s. 18, sub-s. 2, of the Electricity (Supply) Act, 1926, it is provided that " in any case where such consent or approval is "by [the Electricity (Supply) Acts, 1882 to 1922] required, the "Minister or Commissioners, in determining whether to give or "withhold the consent or approval, shall have regard to the "provisions of this Act, and the effect of any scheme or proposed "scheme thereunder."

Sect. 18, sub-s. 2, of the Act of 1926, although not repealing s. 13 of the Act of 1922, empowers the Commissioners, in determining whether to give or to withhold their consent to the extension of a generating station, to consider, not only the advantages which local consumers might derive from an extension, but also the effect which the extension might have on the national scheme for the supply of electricity established by the Act of 1926, and in their discretion to refuse their consent.

MOTIONS for writs of certiorari and mandamus.

By the Chester Electric Lighting Order, 1890, and the Chester Electricity (Extension) Special Orders, 1923 and 1927, the corporation of Chester were authorized to supply electricity within an area comprising the city and county of the city of Chester, and certain urban and rural districts in the vicinity, and were constituted authorized undertakers for the purposes of the Electricity (Supply) Acts, 1882 to 1936. In pursuance

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of their powers under those Acts and orders the corporation established a generating station at Queensferry, in the county of Flint. On December 21, 1938, in accordance with a resolution passed by the city council on December 14, application was made on behalf of the corporation to the Electricity Commissioners for their consent under s. 11 of the Electricity (Supply) Act, 1919, to an extension of the generating station, and for sanction to borrow 397,280*l.* for that extension. The Electricity Commissioners refused their consent to the application, and by letter dated August 10, 1939, gave the following reasons for their decision: "They (the Commissioners) are "advised that they would be entitled to refuse their consent "in a case where the cost of local generation has been shown "to be no greater than that of taking a supply of electricity "from an alternative source, if they came to the conclusion "that, having regard to the provisions of the Electricity "(Supply) Act, 1926, and the effect of any scheme, or proposed "scheme thereunder, they ought to do so. While the "Commissioners find themselves unable to accept in their "entirety the estimates submitted on behalf of the corporation "or those submitted on behalf of the Central Board, they "are satisfied, after full consideration of the evidence and of "the technical and other circumstances of the case, that the "corporation would, if consent were given, be in a position to "give a supply of electricity adequate in quantity and "regularity to meet the present and prospective demands of "their customers at a cost less than that at which they could "give a supply if they obtained a supply from the Central "Board. No reason was shown for refusing consent under "s. 13 of the Act of 1922 (1), and in the interests of the "general supply of electricity in the North Wales and South "Cheshire Electricity District, within which a small part of

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(1) By s. 13 of the Electricity (Supply) Act, 1922, it is provided (inter alia) that: "The Electricity Commissioners shall not— "(*a*) refuse, under section eleven of "the principal Act [the Electricity "(Supply) Act, 1919], their consent to the establishment of a "new, or the extension of an "existing, generating station by "any authorised undertakers if it "is proved to the satisfaction of "the Electricity Commissioners "that, having regard to all the "circumstances of the case, the "undertakers are or will, if the

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"the area of supply of the corporation falls, but, in view of "the advice which they have received, it has been necessary "for the Commissioners to take into account the consideration "to which s. 18, sub-s. 2, of the Act of 1926 (2) directs them "to have regard, as well as any advantages which the electricity "consumers of the corporation might derive from the giving "of consent. The Commissioners have come to the conclusion "that the application of the corporation to extend their station "ought not to be granted."

The corporation now moved for a writ of certiorari to remove to the High Court the decision of the Electricity Commissioners, and for a writ of mandamus, ordering the Commissioners to give their consent to the application.

R. M. Montgomery K.C. (for *Trustram Eve K.C.*, on war service), *G. D. Squibb* and *Harold Willis* for Chester corporation. The Commissioners should not have refused their consent. It is contended on their behalf that, because by s. 18, sub-s. 2, of the Electricity (Supply) Act, 1926, the Commissioners, in deciding whether to give or withhold consent, are to have regard to the provisions of that Act, and any scheme thereunder, the provision in s. 13 of the Act of 1922 that in certain circumstances—all of which exist here—they shall not refuse

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"consent be given, be in a position "to give a supply of electricity "adequate in quantity and regu-"larity to meet present and pro-"spective demands of their con-"sumers at a cost not greater than "that at which they could give a "supply if they obtained a supply "of electricity from some other "available source designated by "the Electricity Commissioners; ". . . . unless the Electricity "Commissioners determine that "such refusal or requirement is "necessary in the interest of the "general supply of electricity in "the district whether provision-"ally or finally determined under "the principal Act . . . ."

(2) By s. 18, sub-s. 2, of the Electricity (Supply) Act, 1926: "Where an application is made "by any authorised undertakers "to the Minister of Transport or "the Electricity Commissioners "for their consent or approval "under the Electricity (Supply) "Acts, 1882 to 1922, in any case "where such consent or approval "is by those Acts required, the "Minister or Commissioners, in "determining whether to give or "withhold the consent or ap-"proval, shall have regard to the "provisions of this Act and the "effect of any scheme or proposed "scheme thereunder."

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their consent to the extension of a generating station has thereby been repealed. "Where there are general words in a "later Act capable of reasonable and sensible application "without extending them to subjects specially dealt with by "earlier legislation, you are not to hold that earlier and special "legislation indirectly repealed, altered or derogated from "merely by force of such general words, without any indication "of a particular intention to do so": per Lord Selborne L.C. in *Seward* v. *The "Vera Cruz"* (1); see also *Blackpool Corporation* v. *Starr Estate Co.* (2), *Tabernacle Permanent Building Society* v. *Knight* (3), *Coster* v. *Headland.* (4) Accordingly, the general words in s. 18, sub-s. 2, however, which apply to twenty-six instances where a consent is required, do not apply to the specific instance of consent in s. 13 of the Act of 1922. The term "this Act" in s. 18 of the Act of 1926 includes the whole series of Acts, which have to be read together: s. 52 of the Act of 1926; and see per Slesser L.J. in *West Midlands Joint Electricity Authority* v. *Pitt.* (5) The correct way of reading s. 18, sub-s. 2, of the Act of 1926 is that the Electricity Commissioners must have regard to what is contained in all the Electricity (Supply) Acts, 1822 to 1922, and, therefore, they must have regard to s. 13 of the Act of 1922. This principle was applied in *Hart* v. *Hudson Brothers, Ld.* (6) See also *Rex* v. *Essex Justices. Ex parte Barking Town Urban Council.* (7)

Sir Donald Somervell A.-G. and *Valentine Holmes* for the Electricity Commissioners. One of the purposes of the Electricity (Supply) Act, 1926, was to set up the Central Electricity Board who (by s. 2) were charged with the duty of supplying electricity to undertakers. For that purpose the Board set up the "grid" system and selected stations for the generation of electricity, the selected stations having to sell all their electricity to the Board. The station at Chester was not one of the selected stations. The policy of the Act was to concentrate the generation of electricity at the selected stations, and s. 18, sub-s. 2, of the Act of 1926 must be construed in that light. The application which was made in this case comes within s. 18, sub-s. 2. There is no greater difficulty in reading s. 18, sub-s. 2, of the Act of 1926 with s. 13 of the Act of 1922 than in reading it with other sections where consents are required. The joint effect of the two enactments is merely to add a further ground on which the Commissioners can refuse their consent. The words "this Act" in s. 18, sub-s. 2, of the 1926 Act, refer only to the 1926 Act, and do not refer also to the Acts which are to be read with it.

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(1) (1884) 10 App. Cas. 59, 68.
(2) [1922] 1 A. C. 27, 34.
(3) [1892] A. C. 298.
(4) [1906] A. C. 286.
(5) [1932] 2 K. B. 1, 43.
(6) [1928] 2 K. B. 629.
(7) [1916] 2 K. B. 406.

Craig Henderson K.C. and *Erskine Simes* for the Central Electricity Board. The Commissioners have full discretion and they have used it in a way which is in strict accordance with the policy and provisions of the Act of 1926.

LORD HEWART C.J. We are all agreed that these motions ought to be dismissed. Charles J. will give the reasons on which our judgment is based.

CHARLES J. [having stated the facts :] It is necessary, in order to comprehend the position in which the Electricity Commissioners find themselves, to examine the history of the Acts of Parliament which have been the subject of discussion before us, so that we may truly interpret certain sections of the Electricity (Supply) Act, 1922, and the Electricity (Supply) Act, 1926.

In 1922 there were dotted all over the country stations for generating electricity in various ownerships, corporate and otherwise, and the owners were by the Act of 1922 given power to borrow money for the establishment or extension of those undertakings.

The Act of 1922 was local in its application. It dealt with districts, and by 1926 it was found necessary, in order to distribute electricity to the best advantage of the nation, to establish the grid system. The Act of 1926 provided also that there should be constituted a Central Electricity Board whose general duties and powers are to be found in s. 2 of that Act, as follows: "The Board shall be charged with the duty of "supplying electricity to authorised undertakers in accordance "with the provisions of this Act, but shall not, save as hereinafter expressly provided, themselves generate electricity, "and the Board shall have such further powers and duties as "are provided by this Act." The scheme which was evolved under this Act is to be found in s. 4: "(1.) The Electricity "Commissioners shall, as soon as practicable, prepare and "transmit to the Board a scheme or schemes relating to the "respective areas specified therein—(*a*) determining what "generating stations (whether existing stations or new stations) "shall be the stations (in this Act referred to as selected "stations) at which electricity shall be generated for the "purposes of the Board." There were, therefore, selected and non-selected stations. The selected stations supplied electricity to the Board, who supplied it to the public, but the Board did not themselves generate.

At Queensferry, Chester Corporation had a station which was not a selected station. It supplied part only of the electricity which was needed in the area. It was certainly not " in a position to give a supply of electricity adequate "in quantity and regularity to meet present and prospective "demands of their consumers "—I am quoting the words of s. 13 of the Act of 1922—because the Central Electricity Board found themselves under the necessity for some years of supplying a very large part of the electricity used in Chester. The authorities in Chester were then faced with the problem whether they should spend a large sum of money on extending the station, if they could get the Electricity Commissioners to sanction the borrowing of the money under s. 11 of the Act of 1922, or should continue to take a supply from the Central Electricity Board. They considered the matter, and came to the conclusion that, if their generating station were extended, they could supply electricity to their consumers at a cheaper rate than if they obtained it from the Commissioners. They, therefore, applied for leave to borrow money with which to extend the station.

What were the duties of the Electricity Commissioners? If s. 13 of the Act of 1922 had stood alone it is quite clear that they could not have refused their consent unless they were satisfied that such a refusal was necessary in the interests of the general supply of electricity in the district. But then came the Act of 1926, and s. 18 of that Act has been the subject of much argument. It is said for the corporation that s. 18 ought not to interfere with the rights conferred on the undertakers by s. 13 of the Act of 1922, and that, if it is held so to interfere as to render s. 13 nugatory, that amounts to repealing that section without an express repeal. I do not think that that result follows. As I have said, the use of electricity had extended very much by 1926 and the grid system had come into force. That grid system, if you look at it in its widest sense, was national and not local. It was intended to benefit all localities, and not only one locality. So, although in 1922, when there was no grid system, the powers of the Electricity Commissioners were limited and they were bound to give their consent unless they found a condition of affairs proved in which the granting of consent would conflict with the interests of a district, by s. 18, sub-s. 2, of the Act of 1926 they were given a further right of objection. That sub-section does not, in my judgment, repeal s. 13, but it is intended to apply to the new position which came into being in 1926. Instead of district supply by undertakers placed all over the kingdom, the Commissioners were dealing with a national supply and they had to apply their minds to the carrying out of the purposes of the Act of 1926, amongst others, at any rate.

The position presented itself to the Board, I think it is fair to say, in this way. " Here we have the corporation of "Chester, who have practically never been able to give an "adequate supply to their consumers. We have found our"selves bound to extend our transmission lines to Chester "to fulfil our duty to make up the balance of the electricity "requirement, and that balance was the bulk. Now we are "asked, perhaps only for a time, to scrap all that, because "Chester says: ' We can extend so as adequately to supply "' our consumers.' Chester may grow, electricity users may "increase, and certainly there would be no finality in the "extension." That scheme proposed by Chester, if it were

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Charles J.

carried out, might in the view of the Commissioners "throw "a spanner into the works" of this gigantic supply scheme. The Commissioners considered the matter—and we are not going to say for a moment that they did not consider it properly and carefully—and they took the view which I have expressed to be the correct view, namely, that their powers of objection are clearly extended, so that they have lawfully and rightly, in fulfilment of their duty under the Act of 1926, exercised the right which is given to them.

I do not propose to deal with the cases which were cited, because I do not think they have a very great deal to do with the matter. I will only indicate that *Blackpool Corporation* v. *Starr Estate Company* (1) dealt with a very different matter from that with which we are dealing here. Lord Finlay, Lord Cave and Lord Phillimore gave as the ground of their decisions that s. 70 of the private Act there under discussion embodied an agreement between the parties for the sale and purchase of land, and that that land was not authorized to be acquired compulsorily. All that was said by their Lordships was that a subsequent general Act is not to be held to set aside a private bargain embodied in a private Act. I do not think that that case affects the present matter in the least. Here, both the Act of 1922 and that of 1926 are general Acts, and the second Act deals with an altered and extended system of electricity supply in this country.

For these reasons we have come to the conclusion that both these motions should be dismissed, with costs, to include the costs of the Central Electricity Board.

HUMPHREYS J. I agree and have nothing to add.

Motions dismissed.

Solicitors for Chester Corporation: *Sharpe, Pritchard & Co., for Gerald Burkinshaw, Town Clerk, Chester.*

Solicitor for Electricity Commissioners: *Treasury Solicitor.*

Solicitor for Central Electricity Board: *Richard H. Fox.*

(1) [1922] 1 A. C. 27.

A. W. G.

HULME *v.* BUCKLOW AREA ASSESSMENT COMMITTEE AND ANOTHER.

1940
May 23, 24.

Rating—Valuation—Objection—Appeal to quarter sessions—Complaint as to conduct of proceedings before assessment committee—Jurisdiction of quarter sessions—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 31, *sub-s.* 4.

On an appeal by a person who is aggrieved by the decision of an assessment committee on an objection made by him to a draft valuation list the jurisdiction of quarter sessions is confined to considering whether the valuation list should be confirmed or whether effect should be given to the objection and the list altered. Quarter sessions cannot entertain an appeal on the ground that the inquiry before the assessment committee was conducted irregularly.

CASE stated by quarter sessions.

On February 11, 1938, the respondents, the Wilmslow (Cheshire) Rating Authority, gave notice of a proposal to insert a hereditament occupied and owned by the appellant, John Hulme, in the valuation list at 40*l.* gross, and 30*l.* rateable, value. On March 2 the appellant lodged a notice of objection with the respondents, the Bucklow Area Assessment Committee. On March 10 the assessment committee met to determine the objection, fifteen members of the committee being present. The rating authority gave evidence in support of the proposal and the appellant in support of the objection, and the assessment committee then adjourned the hearing for a sub-committee of four of their members (which sub-committee had been appointed in the absence of the appellant) to visit and inspect the hereditament. On March 22 the sub-committee inspected the hereditament, the appellant being present and raising no objection. On March 31 the assessment committee received (in the absence of the appellant and without his knowledge) a report from the sub-committee on their inspection, and then approved the proposal. The appellant gave notice of appeal to quarter sessions, but it was agreed between him and the assessment committee that the appeal should be withdrawn and the matter reheard de novo.

On July 5 the rating authority made a fresh proposal in the terms of the former proposal, and on July 15 the appellant lodged an objection thereto. On August 8 the rating authority appointed one Postlethwaite, who was employed by the Cheshire County Valuation Committee as part time valuation officer, to act on behalf of the rating authority on the hearing by the assessment committee of the proposal and objection. The county valuation committee subsequently instructed Postlethwaite to assist the rating authority with regard to the objection. On September 2, 1938, the fresh proposal and objection were heard by the assessment committee, Postlethwaite appearing for and giving evidence on behalf of the rating authority after the assessment committee had overruled an objection by the appellant to his doing so. The assessment committee approved the fresh proposal.

The appellant thereupon appealed against the decision of the committee to Cheshire Quarter Sessions (1), on the grounds that (*a*) it was ultra vires the assessment committee, or a sub-committee thereof, to enter and inspect the hereditament; and (*b*) that the county valuation committee had been allowed to appear and be heard through the county valuation officer, although no notice had been given to him (the appellant) under the Rating and Valuation Act, 1925, s. 18, sub-s. 3.

Quarter sessions held that they had no jurisdiction to hear an appeal on these grounds and they dismissed the appeal, subject to the opinion of the High Court whether they had come to a correct decision in point of law.

Lind-Smith for appellant. The appeal should be allowed. The members of an assessment committee have no power to

(1) By the Rating and Valuation Act, 1925, s. 31, sub-s. 1: "Any person who appeared before "the assessment committee on the "consideration of an objection "[to a draft valuation list] made "before the committee . . . . "may, if he is aggrieved by "the decision of the committee on "the objection, appeal against the "decision . . . . to the court of "quarter sessions for the county "or place where the hereditament "to which the objection related "is situate."

Sub-s. 4: "On an appeal under "this section the court shall, as "it thinks just, either confirm the "valuation list or alter the valua"tion list to give effect to the con"tention of the appellant so far "as that contention appears to "the court to be well founded."

inspect a hereditament nor to appoint a sub-committee to do so on their behalf. They are a statutory body whose powers are regulated by the Rating and Valuation Act, 1925, and no power is given them by that Act to view hereditaments. [He referred to *London General Omnibus Co.* v. *Lavell* (1); *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Committee.* (2)] Moreover, Postlethwaite was an officer of the county valuation committee and he appeared before the assessment committee although no notice had been given to the appellant under s. 18, sub-s. 3, of the Act of 1925.

Comyns Carr K.C. and *George Bankes* for the respondents. Quarter sessions were right in deciding that they had no jurisdiction to entertain the points raised by the appellant. Their jurisdiction is purely statutory and is defined by s. 31, sub-s. 4, of the Rating and Valuation Act, 1925, as being merely to consider those matters which will enable them to decide whether the valuation list should be confirmed or whether it should be altered. The appellant complained, not of the decision of the assessment committee, but of the procedure which preceded it, and that should have been the subject of proceedings for mandamus or certiorari. There is no substance in the two points now put forward by the appellant.

Lind-Smith in reply. The fact that a mandamus will lie to remedy a defect in procedure does not preclude that matter being raised on appeal to quarter sessions.

The Court (CHARLES and HUMPHREYS JJ.)* dismissed the appeal.

CHARLES J. [after stating the facts:] There is, so far as I can see, no statutory authority which compels an owner of property to permit an assessment committee, or a sub-committee thereof, to inspect the hereditament. The power which the committee have is to appoint a valuer, who is given the right, even against the assent of the owner, to enter on the property and make a report: Rating and Valuation Act, 1925, s. 38, sub-s. 1. In this case, however, the matter does not arise, because the appellant offered no objection to the inspection by the sub-committee, and in those circumstances he cannot be heard afterwards to say that their entry on his premises was wrong.

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* By consent the appeal was heard by two judges, Lord Hewart C.J. being indisposed.

(1) [1901] 1 Ch. 135.

(2) [1937] Ch. 361.

Another objection taken is that the valuer of the county valuation committee, acting in that behalf, gave evidence before the assessment committee, although no notice had been given to the appellant under s. 18, sub-s. 3, of the Rating and Valuation Act, 1925. It is, however, stated in the case that the valuer did not appear for the county valuation committee, but that he had been asked to assist the rating authority.

Before us, the rating authority rely on a finding by quarter sessions that they had no jurisdiction to hear an appeal on the grounds to which I have already referred, so we have to consider what their jurisdiction was. The jurisdiction which quarter sessions has on an appeal such as that in the present case is set out in s. 31 of the Rating and Valuation Act, 1925. [His Lordship read sub-s. 1 of the section, and continued:] What is to be considered by the assessment committee on an appeal under that sub-section is, aye or no, shall this house be entered in the valuation list, and, if so, at what figure? By s. 31, sub-s. 4: "On an appeal under this section the Court shall, "as it thinks just, either confirm the valuation list or alter "the valuation list to give effect to the contention of the "appellant so far as that contention appears to the Court "to be well founded." That is the limit of the authority of quarter sessions, and if the appellant wanted to attack the propriety, the regularity, or the conduct of the inquiry before the assessment committee, the proper way for him to do it would be to apply to this Court for a writ of mandamus directing the committee to hear and determine in accordance with law. Then the whole matter would be open to him. He could argue that the committee had proceeded irregularly, and, if he persuaded this Court of that, a writ would go and he would have his remedy. I am quite clear that this appeal should be dismissed.

HUMPHREYS J. So far as I am aware, there is not the smallest objection in law to an assessment committee, having heard evidence, adjourning their decision so that, with the consent of the owner of the property, they may make themselves acquainted with the hereditament with which they have to deal, and if they have that power, it appears to follow that they can appoint a small number of their body to do so and to report to the whole committee. The only statutory ground which is cited to us in support of the appellant's contention that the assessment committee had no right to inspect the property with the consent of the occupier is the power vested in the assessment committee by s. 38, sub-s. 1, of the Act of 1925, to appoint a surveyor or valuer to inspect the property. There is nothing whatever in that point. The complaint about the appearance before the assessment committee of Mr. Postlethwaite appears to be based on a misinterpretation of the facts and it is not necessary to say any more about it.

Mr. Comyns Carr has said, however, that, even if there were something to be said for those two points, quarter sessions rightly decided that they had no jurisdiction to entertain either of those questions. When one comes to look at the notice of appeal and the contentions on that notice which are stated in the case, it appears that the one thing which the appellant did not contend was that his premises were wrongly rated. There is not a word to be found in his contentions indicating any reason why his premises should not be rated at 40*l.* gross and 30*l.* rateable. There are eight contentions and every one of them has relation to the proceedings and conduct of the assessment committee and none to the subject-matter of the appeal. I think that quarter sessions were perfectly right in holding that they had no jurisdiction to deal with those matters. All they could do was to hear, as the statute requires them to do on the appeal, evidence on the issue whether they should confirm the valuation list or alter it, in other words, in the present case, whether they should uphold the suggested assessment of 40*l.* gross and 30*l.* rateable, or whether they should alter it. In my view, quarter sessions were right in saying that they could not decide on the matters

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complained of, although no doubt the High Court could have done so on a proper proceeding if there had been any substance in them.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Peacock & Goddard, for Percy H. Barker & Co., Manchester.*

Solicitors for respondents: *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

G. F. L. B.

CHANDLER *v.* EMERTON AND OTHERS, JUSTICES.

1940
May 24.

Licensing—Occasional licence—Regularity of applications—Jurisdiction of justices—Discretion—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24) *s.* 64, *sub-s.* 1.

Applications were made to justices for occasional licences authorizing the applicant to sell intoxicating liquors at dances at a hall on thirteen nights—four Tuesdays, four Thursdays and five Saturdays—in one calendar month. The Thursday and Saturday night dances had been held regularly for four and a half years and the Tuesday night dances for six months, and in respect of them all occasional licences had been granted regularly to the applicant. The justices, however, refused the present applications on the ground that they " had no jurisdiction to grant " the said applications, considering the word ' occasional ' [in " s. 64, sub-s. 1, of the Licensing Act, 1910] constituted a " complete bar to the grant of applications made regularly " :—

Held, that the justices were wrong in refusing the applications on the sole ground that the word " occasional " prevented them from granting them, but that they had jurisdiction to grant or to refuse such applications as, after considering them and exercising their discretion judicially, they found good reason.

CASE stated by justices.

At a petty sessions holden at Enfield on April 29, 1940, an application was made to Edmonton (Middlesex) justices by the appellant, Benjamin John Chandler, under s. 64, sub-s. 1, of the Licensing (Consolidation) Act, 1910, for the consent to the grant to him by the Commissioners of Customs and Excise of occasional licences authorizing him to sell intoxicating liquors at the Royalty Hall, Southgate, on (inter alia) Tuesdays, June 4, 11, 18 and 25, 1940; on Thursdays, June 6, 13, 20 and 27, 1940; and on Saturdays, June 1, 8, 15, 22 and 29, 1940.

The particular functions in respect of which the appellant applied for the licences were in each case dances which were in continuance of a series of dances held regularly week by week since October, 1935, in respect of the Thursday and Saturday night dances, and since October, 1939, in respect of the Tuesday night dances, in respect of which dances applications for occasional licences had been periodically made and, up to February 9, 1940, had been regularly granted. In the case of the series of dances held on Tuesdays, they were promoted by the same promoter, namely, one Rogers, master of ceremonies at the hall; in the case of the series held on Thursdays, by one Berks, leader of the band at the hall; and, in the case of the series held on Saturdays, by one Dennis, on behalf of Royalty Hall (Southgate), Ld., proprietors of the hall. The applications for occasional licences in respect of the series of dances had been made by the appellant from time to time as the occasions arose.

The justices were of the opinion that "on the facts proved "and admitted, we had no jurisdiction to grant the said "applications, considering the word 'occasional' constituted "a complete bar to the grant of applications made regularly," and they accordingly refused them.

The question of law submitted for the opinion of the Court, therefore, was whether the justices were right in law and were acting within their jurisdiction in refusing the applications on the sole ground that the word "occasional" prevented them from granting them, or whether they were wrong in law, and took into consideration matters outside their jurisdiction in refusing the applications.

Sidney Lamb for appellant. The justices were wrong in saying that the wording of s. 64, sub-s. 1, of the Act of 1910 deprived them of jurisdiction to deal with the applications. If the justices find that there is an "occasion" within the meaning of the sub-section and that it is conducive to public convenience, comfort, and order that an occasional licence should be granted (Revenue Act, 1862, s. 13), there is nothing to prevent their granting applications for every day in the year. The words "occasional licence" in s. 64, sub-s. 1, mean a licence in respect of an occasion and not a licence to be granted only occasionally. [He was stopped.]

Christmas Humphreys for respondents. The justices were entitled in their discretion to hold that applications for thirteen licences in thirty days were not applications for occasional licences. "Occasional" means "now and then; "not regular or frequent" (see Concise Oxford Dictionary).

The Court (CHARLES and HUMPHREYS JJ.)* allowed the appeal.

CHARLES J. [after stating the facts :] The justices undoubtedly had jurisdiction to refuse these applications if, after considering them, they found good reason why occasional licences should not be granted. They might, perhaps, think that the occasions were too frequent, or that they were not proper occasions. There were a thousand and one grounds on which they could exercise their discretion provided they did so judicially. Unfortunately, however, they did something quite different and came to the conclusion that they had no jurisdiction to grant the applications because they considered that "the word "'occasional' constituted a complete bar to the grant of "applications made regularly." That is to say, they took the view that their consideration of the applications was no longer a matter of discretion because, if the presence in the sub-section of the word "occasional" constituted "a complete "bar to the grant of applications made regularly," they had no business to consider whether, for instance, they would grant a licence to the same applicant once or twice or thrice. Whatever may be the way in which the justices find it proper to exercise their discretion, when we are asked the question whether they were right in law in refusing the applications on the sole ground that the word "occasional" prevented them from granting them our answer must be in the negative. The case, therefore, will be remitted to the justices with an expression of the opinion of the Court which I have indicated.

HUMPHREYS J. I agree.

Appeal allowed.

Solicitors for appellant : *Martineau & Reid.*

Solicitor for justices : *C. W. Radcliffe.*

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* By consent the appeal was heard by two judges, Lord Hewart C.J. being indisposed.

G. F. L. B.

1940
May 27.

GRIFFITHS *v.* DALTON.

Banker—Undated cheque—Obligation on banker to honour—Bills of Exchange Act, 1882 (45 & 46 *Vict.* c. 61), *s.* 20.

A banker is not bound to honour an undated cheque. The prima facie authority to fill in the date given by s. 20 of the Bills of Exchange Act, 1882, to the person in possession of the cheque, must, at common law, be exercised within a reasonable time.

ACTION tried by Macnaghten J.

The plaintiff, Lewis Griffiths, claimed 750*l.* on a cheque from the defendant, J. H. Norcliffe Dalton (since deceased and represented by his executors). The cheque was given to the plaintiff in August, 1931, and at that time bore no date. Nothing was done with it until February, 1933, when the plaintiff filled in the date on the cheque—February 20, 1933. He then presented the cheque for payment at a Brighton branch of the Midland Bank, but it was dishonoured and he brought this action. The defendants pleaded that the cheque was incomplete and wanting in a material particular, namely, the date, and that the plaintiff had no implied authority to fill it in, as he did not do so until after a reasonable period had elapsed.

Thorold Rogers (for *C. P. Harvey* on war service) for the plaintiff. The date on a cheque is not a material particular. In the article on Bankers and Banking in Halsbury's Laws of England (Hailsham edition), vol. i., p. 822, para. 1341, which was written by Sir John Paget, it is stated : "Bankers usually "refuse payment of an undated cheque . . . . The practice "is of doubtful validity." By the Bills of Exchange Act, 1882, s. 3, sub-s. 4 : "A bill is not invalid by reason (*a*) that it is not "dated," and in Byles on Bills, 20th ed., p. 80, it is said : "If "there is no date, [a bill] will be considered to be dated as of the "time at which it was made, or rather, it is suggested, at "which it was issued," and *Hague* v. *French* (1), and *Giles* v. *Bourne* (2) are cited to support that proposition. These cases show that a banker is bound to honour an undated cheque, subject to his being entitled to make inquiries first. The drawer

(1) (1802) 3 B. & P. 173.

(2) (1817) 6 M. & S. 73.

of an undated cheque impliedly gives the payee authority to fill in the date. Even if the date is held to be a material particular, s. 20 of the Act of 1882 gives the plaintiff prima facie authority to fill it in, no doubt within a reasonable time, and, in the circumstances, the plaintiff did so.

N. R. Fox-Andrews for the defendant. The date is a material particular and a banker is entitled to refuse to honour an undated cheque. A reasonable period had long elapsed before the date was added in the present case.

MACNAGHTEN J. [After stating the facts]: Counsel for the plaintiff has argued that the date on a cheque is immaterial to a banker, that bankers are bound to honour undated cheques, and that the custom by which they refuse to do so is not in accordance with the law. He cited in support of those propositions, *Hague* v. *French* (1), and *Giles* v. *Bourne*. (2) So far, however, as I understand those cases, they do not support the proposition that an undated cheque is an instrument which the banker on whom it is drawn is bound to honour. They turn entirely on points of pleading. Although the cheque in the present case bore no date, the plaintiff, by s. 20 of the Bills of Exchange Act, 1882, following what, I think, was the common law before the passing of that Act, had a prima facie authority to fill in the date, but by the common law he was bound to do so within a reasonable time. The question what is a reasonable time is a question of fact, and on the facts of this case I am satisfied that the reasonable time had long since elapsed. There was, therefore, no authority to fill in the date as it appeared on the cheque and no liability on the bank to meet it. The claim on the cheque fails.

[On a claim for money lent his Lordship gave judgment for the plaintiff for 400*l*., there being no order as to costs.]

Judgment for plaintiff.

Solicitors for plaintiff: *E. T. Master for Fowell, Sayer & Thorold, Norwich.*

Solicitors for defendant: *Iliffe, Sweet & Co.*

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(1) 3 B. & P. 173.

(2) 6 M. & S. 73.

W. L. L. B.

1940
May 28, 29.

S. SOUTHERN (INSPECTOR OF TAXES) *v.* ALDWYCH PROPERTY TRUST, LIMITED.

Revenue—Income tax—Investment company—Costs of advertising unlet property—Expenses of management—Relief in respect of costs of " maintenance, repairs, insurance and management "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 33, *sub-ss.* 1, 3 ; *r.* 8 *of No. V. of Sch. A.*

The respondent company carried on the business of an investment and trust company, and in particular in relation to the investment of money in and the holding of real and personal property, the management of such property, and the collection and receipt of rents and profits therefrom. For the purpose of letting unoccupied flats it had incurred expenses for advertising, and having suffered taxation by deduction and otherwise it claimed to be entitled to repayment of the tax collected on those expenses as expenses of the management of the company's business within the terms of s. 33, sub-s. 1, of the Income Tax Act, 1918 (1) :—

Held, that the expenses in question were costs of management as to which relief could be claimed under r. 8 of No. V. of Sch. A, and the company was therefore debarred by the terms of sub-s. 3 of s. 33 (2) from claiming relief under s. 33, sub-s. 1.

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(1) Income Tax Act, 1918, s. 33, sub-s. 1 : " Where . . . . any "company whose business consists "mainly in the making of investments, and the principal part of "whose income is derived therefrom . . . . claims and proves "to the satisfaction of the special "commissioners that, for any "year of assessment, it has been "charged to tax by deduction or "otherwise, and has not been "charged in respect of its profits "in accordance with the rules "applicable to Case I. of Schedule "D, the company . . . . shall be "entitled to repayment of so "much of the tax paid by it as "is equal to the amount of the "tax on any sums disbursed as "expenses of management (including commissions) for that "year."

(2) Sect. 33, sub-s. 3 : " A company . . . . shall not be entitled "to any relief under this section in "respect of any expenses as to "which relief may be claimed or "allowed under rules 7 and 8 of "No. V. of Schedule A."

Rule 8 of No. V. of Sch. A : "If the owner of any land or "houses to which this rule applies "shows that the cost to him of "maintenance, repairs, insurance, "and management, according to "the average of the preceding "five years, has exceeded . . . . "in the case of houses [the "authorised reduction] he shall be "entitled in addition to any "reduction of the assessment for "the purposes of collection, on "making a claim for the purpose, "to repayment of the amount of "the tax on the excess."

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the Special Commissioners held on June 2, 1938, Aldwych Property Trust, Ld. (hereinafter called the "respondent company"), claimed under s. 33 of the Income Tax Act, 1918, repayment of so much of the income tax paid by it for the years ending April 5, 1936, and April 5, 1937, as was equal to the amount of the tax on the sums disbursed as expenses of management for those years respectively. The claim was objected to by the inspector of taxes to the extent and on the ground that among the expenses of management there were included sums which the respondent company had spent in advertising for tenants for unlet flats which it owned. The claim accordingly fell to be heard and determined by the Special Commissioners in like manner as in the case of an appeal under Sch. D.

The sole question before the Commissioners was whether, as was contended for the respondent company, the said costs of advertising were expenses of management of its business within the meaning of s. 33 of the Income Tax Act, 1918, or whether, as was contended for the Crown, they were expenses as to which relief might be claimed under r. 8 of No. V. of Sch. A, and in respect of which the respondent company was therefore debarred from relief under s. 33 by the terms of sub-s. 3 of that section.

The respondent company was incorporated on December 12, 1934, with a nominal capital of 300,000*l.* The objects for which it was established were (inter alia), "to carry on the "business of an investment and trust company, and in "particular in relation to the investment of money in and the "holding of real and personal property, the management of "such property, and the collection and receipt of rents and "profits therefrom."

It was common ground that the respondent company was one which came within the terms of s. 33 of the Income Tax Act, 1918, and that it had suffered tax by deduction and otherwise for the years concerned.

The respondent company proceeded, after its incorporation, to acquire blocks of flats which had been erected by other concerns. The vendors of these properties guaranteed a certain net income from each over a number of years. In all, nine large blocks of flats were acquired. Three of these were entirely empty and no letting had begun. The other six blocks were partly let. At first, the respondent company appointed Messrs. Knight & Company, estate agents, to do the work of letting the flats. In connection with this work Messrs. Knight & Company utilized the services of advertising agents, paying the bills for advertisement, and being reimbursed by the respondent company for the amounts so paid. Messrs. Knight & Company also collected the rents of properties let, and in some instances employed sub-agents for the purpose. The value of the property owned by the respondent company was approximately 600,000*l.* The total spent on advertising was 2132*l.* in 1935–36 and 2894*l.* in 1936–37.

The costs of advertising, in the same way as other expenses, were shown separately in the revenue account of the respondent company against each property. They were so debited in order to enable the net income of each property to be ascertained in connection with the guarantees of net income above referred to.

In the year 1936–37 the way in which the respondent company's business was managed underwent certain changes. It was one of a group of six property companies, associated to some extent through common shareholdings and directorates. During 1935–36 the other five companies had entrusted the management of their business to different firms. The heads of these firms used to meet from time to time, and called themselves the advisory council of management. They also invented the name "Plus Flats" for the flats owned by the aforesaid group of companies. In March, 1936, chiefly to secure the exclusive use of this name, they incorporated themselves into a company, Plus Flats Management Ld. (hereinafter referred to as the "Plus Flats company)." The capital of the Plus Flats company was 150*l.*, and the shareholders were the individual members of the advisory council. The advisory council still continued to exist, functioning as advisory council to the Plus Flats company.

At the end of the year 1935–36 Messrs. Knight & Company gave up their duties of management for the respondent company except as regards one property. From March to September, 1936, the respondent company left the management of all its other properties to firms of local agents. Advertising was entrusted to Messrs. Lord & Thomas, consulting advertising experts. All these concerns were represented on the advisory council to the Plus Flats company. In July, 1936, the respondent company withdrew the management of one or two of its properties from local agents and transferred it to the Plus Flats company. In September, 1936, it transferred the management of all its other properties to the Plus Flats company.

The advisory council met once a fortnight and a representative of each of the six companies attended the meetings. The advisory council would make proposals in regard both to general and to particular advertisements, and the representatives of the companies usually approved. Thus the flats not being fully let it would propose that the group should spend so much in advertising " Plus Flats " generally. It would also propose that any one of the six companies should spend so much on such and such a particular property where the letting was not going too well. The cost of general advertising was apportioned among the companies on the basis of the unlet property of each. The cost of the particular advertising was borne directly by the company concerned.

The Commissioners were of opinion that in r. 8 of No. V. of Sch. A the sense of the word " management " had to be determined from the context, where it was narrowed down by association with the words " maintenance," " repairs " and "insurance." In s. 33 of the Act of 1918, on the other hand, the term "expenses of management " was not qualified in any such way, but was used in a broad sense as related to a company's business expenditure. They held that the advertising expenditure to which the claim related was not expenditure as to which relief might be allowed under r. 8, No. V. of Sch. A, but fell within the relieving provisions of s. 33. They accordingly allowed the claim.

The appellant, the Inspector of Taxes, appealed.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. The Crown contends that the respondent company is entitled to make a deduction under r. 8 of No. V. of Sch. A in respect of advertising the unlet flats, as being costs of management of the flats. It is said on the other side that inasmuch as the term "management" is used in the rule in collocation with "maintenance," "repairs" and "insurance," it must have been used to designate something relatively as limited as each of the other matters, but different from them, and that it is confined to the costs in having the estate accounts properly kept, in collecting the rents, and in making the necessary disbursements. The judgment of Lord Clyde in *Inland Revenue Commissioners* v. *Wilson's Executors* (1) is relied upon for that contention. The contention on behalf of the respondent company is that the company comes within sub-s. 1 of s. 33 of the Income Tax Act, 1918.

But it is expressly provided in sub-s. 3 that "A company ". . . . shall not be entitled to any relief under this section "in respect of any expenses as to which relief may be "claimed or allowed under rules 7 and 8 of No. V. of "Schedule A."

It would be very strange if the word "management" had a narrower meaning in r. 8 than in s. 33. Prima facie the word "management" is used in the same sense throughout the whole Act of Parliament. It is therefore a very wide term. It is said that s. 33 is directed towards the management of a business, whereas r. 8 of No. V. of Sch. A deals with the owners of property as such. But where you are dealing with the actual management of land there is no reason why the cost of advertising unlet flats should not be part of the costs of management under r. 8 of No. V. of Sch. A. Rowlatt J. dealt with the term "management" in *Bennet* v. *Underground Electric Railways Co.* (2), but his judgment merely shows what management is not. *Morley* v. *Lawford & Co.* (3) does not deal with the point raised in the present case. The Crown rely upon the judgment of Lord Sands in *Inland Revenue Commissioners* v. *Wilson's Executors* (1), where he said that he would be disposed to include among management charges "all charges fairly described as business charges incident to "the prudent management of the estate, to whomsoever these "charges were incurred, not being charges incident to business "in connexion with business matters of a substantial "character." If the present decision is upheld it follows that costs of advertising cannot be deducted as expenses of management. *London and Northern Estates, Ld.* v. *Harris* (2) dealt with this point. The judgment shows that there may be a distinction between the expenses of management of property and the expense of management of a business. In the present case it is conceded on both sides that the cost of advertising flats to let is an expense of management, but the Crown contend that it is an expense of management under both s. 33 and under r. 8 of No. V. of Sch. A, and is therefore recoverable only under the latter rule.

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(1) 1934 S. C. 244, 251; 18 Tax Cas. 465, 473.

(2) [1923] 2 K. B. 535; 8 Tax Cas. 475.

(3) (1928) 14 Tax Cas. 229.

T. N. Donovan for the respondent company. The Commissioners arrived at a correct conclusion. Sect. 33 of the Act of 1918 is specifically directed to the case of a business, whereas r. 8 of No. V. of Sch. A deals with the owner of property as such. The cost of advertising empty accommodation is an expense of managing the business of the respondents which falls within the terms of s. 33, and is not comparable with the cost of "maintenance, repairs and insurance" in which context the cost of "management" appears in r. 8. Judged by its context in r. 8 "management" there denotes something akin to maintenance, repairs and insurance, and it would be irrational to make the allowance for advertising expenses depend on the quantum of the repairs allowance. Moreover, advertising costs are normally incurred when property is unoccupied, and during that time there is no Sch. A liability to tax. It was decided in *Inland Revenue Commissioners* v. *Wilson's Executors* (1) that advertising costs such as these

(1) 1934 S. C. 244, 253; 18 Tax Cas. 465, 476.

(2) [1939] 1 K. B. 335.

were not within the term "management" in r. 8. In any event where a company is carrying on a business of letting flats its advertising costs are expenses of running the business rather than costs of management of the property.

LAWRENCE J. This is an appeal by the Crown against a decision of the Special Commissioners. The question is whether the costs of advertising are expenses of the management of the respondent company's business within the meaning of s. 33 of the Income Tax Act, 1918, or whether they are expenses as to which relief may be claimed under r. 8 of No. V. of Sch. A.

The respondent company is a company such as is referred to in s. 33 of the Income Tax Act of 1918, and it is contended on its behalf that it is therefore entitled to relief in respect of these advertising expenses as "expenses of management "(including commissions)" within s. 33, sub-s. 1. That claim is contested by the Crown on the ground that the advertising expenses in question are advertising expenses in respect of which relief might be claimed under r. 8 of No. V. of Sch. A, and are therefore excluded from the operation of s. 33, sub-s. 1, by virtue of s. 33, sub-s. 3. The question, therefore, is whether these advertising expenses fall within r. 8 of No. V. of Sch. A.

The respondent company owns and manages a number of flats in London, and the facts with reference to these flats, and the advertising expenses in question, are set out in paras. 8 to 11 of the special case. The Special Commissioners have not based their decision upon any particularity in these facts, but have decided the question on the construction of r. 8 of No. V. of Sch. A, and have held that the word "management" in that rule must be narrowed down by its association with the words "maintenance, repairs and "insurance"; and that when so narrowed down it must be held to exclude the cost of advertising for tenants of such flats as these.

On behalf of the respondent it is contended, firstly, that the word "management" in s. 33, sub-s. 1, is clearly used in a different and a wider sense than it is in r. 8, because it is used by itself and because it includes commissions. Secondly, it is contended that the owner of property normally advertises his property when it is empty, and that when it is empty or unoccupied no tax is exigible; and therefore it is contended there is no claim to relief, and for that reason the cost of advertising ought not to be held to fall within the term "cost of management" under r. 8 of No. V. of Sch. A. It was also argued on behalf of the respondent that it was irrational to make the allowance in respect of the expenses dealt with in r. 8 dependent on the quantum of the repairs allowance under r. 7. The main argument, however, was that in the context in which the word "management" is used in r. 8 the word must mean something ejusdem generis with "maintenance, repairs and insurance." It was argued that that class is a class which imports something to do with the property as property, and not as a business. It was said that a company such as the respondent company when it advertises its flats is really expending money not on the property but on the business; and lastly, that *Inland Revenue Commissioners* v. *Wilson's Executors* (1) was a decision that advertising expenses would not fall within the heading of "management" in r. 8. Some reliance was also placed upon the fact that the costs of advertising in question had been incurred on behalf of five other companies besides the respondent company, and had then been apportioned between those six companies by reference to the unlet flats of the various companies; and it was said that it would be highly artificial to split up the costs between the particular properties, as would have to be done if they were to be allowed under r. 8.

On behalf of the Crown it was contended that if r. 8 is read in its ordinary sense it is clear that the expression "management of the property" would cover such an expense as the cost of advertising the property to be rented. It was suggested that it was impossible to manage property in a business sense without letting the property, and it was pointed out that the other rules of Sch. A clearly and expressly contemplate that property is normally let. It was further argued that the only proper limitation which can be put upon the word "management" in r. 8 is that it means the management of real property under Sch. A; and it was said that whereas the words "maintenance and repairs" do clearly refer to the fabric of the building, or to the land itself, the words "insurance" and "management" seem to refer to the business of owning land and buildings rather than to the land and buildings as objects. Mr. Hills answered the argument of Mr. Donovan as to these expenses being really expenses of the business rather than expenses of the management of the property by pointing out that if the business includes the management of property, the expenses of that business remain the expenses of the management of property. With reference to the argument of the respondent that advertisements are normally made when the property is unlet, Mr. Hills pointed out that that is not true, and that it frequently and perhaps normally happens that advertisement takes place before property becomes unoccupied. In any event, he pointed out, the allowance provided for in r. 8 is an allowance based upon the average of the preceding five years and must include the "maintenance, repairs, insurance and "management" over those five years, whatever they are, whether the property was occupied or not during those five years.

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(1) 1934 S. C. 244; 18 Tax Cas. 465.

With reference to *Inland Revenue Commissioners* v. *Wilson's Executors* (1) it was submitted on behalf of the Crown that that was not a decision against the contention of the Crown, because that was merely a decision that the compensation paid by a landlord to his tenant for disturbance, and the costs of litigation with that tenant over the question of his compensation, were not "costs of management" within the meaning of r. 8. In my judgment the contention of the Crown, both generally and with reference to the case of *Wilson's Executors* (1), is right. I observe that Lord Clyde (Lord President), Lord Sands and Lord Morison use

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(1) 1934 S. C. 244; 18 Tax Cas. 465, 473, 476, 477.

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Lawrence J.

expressions which in my view indicate that in their opinion such costs as those in question in the present case would have fallen within the meaning of the word "management" in r. 8. Lord Clyde in particular, whose judgment it was suggested was most in favour of the respondent, said that the costs of managing the estate "would include any cost in "having the estate accounts properly kept, in collecting the "rents and in making the necessary disbursements." The question is, is the cost of advertising a "necessary "disbursement" in managing the property? In my opinion it is perfectly clear that it is. No property which is let can be managed in an ordinary business sense without advertisement of the property when it is about to become vacant.

Upon the whole, I find myself unable to agree with the decision of the Special Commissioners in this case that the word "management" in r. 8 ought to be narrowed down by its association with the words "maintenance, repairs and "insurance." I do not think that the words "maintenance, "repairs and insurance" form any class which excludes the word "management" in the sense which I put upon that word. I think that the word "management" has its ordinary meaning, and includes all the ordinary expenses of management of the property which falls to be taxed under Sch. A. I am, therefore, of opinion that the expenses in question in this case do not fall within s. 33, sub-s. 1, because they are excluded by s. 33, sub-s. 3, and in consequence the appeal must be allowed with costs.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

A. W. G.

1940
May 29, 30;
June 6.

SOTHERN-SMITH *v.* CLANCY (INSPECTOR OF TAXES).

Revenue—Income tax—Contract for annual payments in consideration of single premium—Aggregate of annual payments in no case to be less than capital invested—Whether annual payments income or capital in hands of recipient.

S. entered into a contract with an insurance society whereby, in consideration of a single payment, the society undertook: (1.) that they would pay him an annual sum during his life; (2.) that if, at his death, the sum of the annual payments then made equalled or exceeded the capital invested, the contract should be at an end; (3.) that in the event of his death before the sum of the annual payments equalled the capital invested, they would make annual payments of the same amount to the appellant until the sum of the annual payments equalled the capital invested; (4.) that, after two years and before the annual payments equalled the capital invested S. might accept a cash surrender value of the unreturned part of the capital invested, discounted at four per cent. compound interest.

S. having died without having surrendered the contract, and before the annual payments equalled the capital invested, the society continued to make the annual payments to the appellant:—

Held, that the payments to the appellant were capital, and, therefore, not assessable to income tax.

CASE stated by the Special Commissioners of Income Tax.

Mrs. E. M. Sothern-Smith, the appellant, appealed to the Special Commissioners against assessments to income tax under Sch. D for the years 1935–36, 1936–37, and 1937–38, in the sums of 1793*l.*, 1763*l.* and 1750*l.* respectively. Included in the amounts of the assessments were certain sums in respect of payments made to the appellant by the Equitable Life Assurance Society of the United States in pursuance of a contract dated December 24, 1928, made between the society and a Mr. E. H. S. Sothern (" the annuitant ").

By that contract (which was based on an " annuity application " by the annuitant) the society in consideration of the payment by the annuitant of $65,243.22 (called in the contract "capital invested "), agreed to pay him an annual sum (called in the contract an "annual annuity "), of $6510 during his lifetime. The society guaranteed that, while the aggregate

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amount of the annual payments to be made might amount to more, it should not in any event amount to less, than the amount of the capital invested, unless the contract were determined by surrender. The aggregate amount might exceed the capital invested if the annuitant himself were to live long enough to draw more by way of annuity than the $65,243.22. If, on the annuitant's death, the sum of the payments already made equalled or exceeded the amount of the capital invested, the contract was at an end. In the event, however, of the death of the annuitant before the annual sums paid equalled the amount of the capital invested, the society undertook to continue payments of the annuity to the annuitant's sister (the appellant) if living, and, if not living, then to the annuitant's wife until the total amount of the payments made under the contract should equal the amount of the capital invested. If the annuitant and the beneficiary should both die before the sum of the payments made by the society equalled the amount of the capital invested, subsequent payments as they fell due were to be made to the personal representatives of the last survivor of the annuitant and beneficiary. After the contract had been in force for two years and provided that the sum of the annuity payments had not equalled the capital invested it might be surrendered by the annuitant for its cash surrender value which should be the commuted value (discounted at four per cent. compound interest) of the remaining annuity payments necessary to complete the capital invested.

The annuitant died on December 28, 1933, when the aggregate amount which had been paid to him amounted only to $26,040. In fulfilment of the contract the society had made each year since the death of the annuitant annual payments of $6510 to the appellant. In each of the assessments appealed against there was included the annual sum of $6510 converted into sterling, and the ground of the appeal by the appellant, who was a British subject ordinarily resident in the United Kingdom, was that those sums were capital and not income, being annual instalments of a fixed capital sum of $39,203.22 in respect of which the society became indebted to her under the contract on the death of the annuitant, and were therefore wrongly included.

The Special Commissioners were of opinion that the contract was made to secure payment of an annuity to or by the direction of the annuitant; that the annuity was income in the hands of the recipient; and that the fact that in the events that happened the aggregate of the periodical payments was limited to the amount of the capital invested did not alter the character of the payments so as to make them repayments of capital. The appellant, accordingly, appealed.

Cyril King K.C. and *N. E. Mustoe* (for *J. W. P. Clements*, on war service) for the appellant. The decision of the Commissioners was wrong. It is only in the event of the annuitant surviving beyond ten years that any question of an annuity arises. In the case of an ordinary annuity the capital expended in its purchase passes away from the annuitant and its place is taken by an annual sum. The capital is never returned as such. The Crown claims that the sums paid to the appellant are profits, and, therefore, income, but they are really the return of capital by instalments. In every event under this contract either the annuitant or his sister or his wife were going to get back every penny of the sum paid. The fact that in a certain contingency the annuitant would be entitled to receive annual payments of $6510 after the expiration of ten years cannot affect the quality of the sums paid until the whole $65,000 have been returned. Moreover an annuity is a series of payments of an equal amount, and in the present case the eleventh payment would be only about $240. As to what is an annuity for income tax purposes see *Foley* v. *Fletcher*. (1) They also referred to *Perrin* v. *Dickson*. (2)

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The payments undertaken by the Society under this contract are called "annuity" or "refund annuity" from beginning to end. There are two well known classes of annuities—

(1) (1858) 3 H. & N. 769.

(2) [1929] 2 K. B. 85; and in C. A. [1930] 1 K. B. 107; 14 Tax Cas. 608.

life annuities and terminable annuities. On its true construction this is a combination of the two. If the annuitant had been content with a life annuity, he could have got a bigger annual payment, although at the risk that he might get nothing for his money if he died very soon, so it is coupled with a terminable annuity to ensure his getting value for money, but that does not make it repayment of instalments of capital. *Foley* v. *Fletcher* (1) was a case of the purchase price of an estate, and is clearly distinguishable from *Coltness Iron Co.* v. *Black.* (2) *Perrin* v. *Dickson* (3) is also distinguishable, for the Court of Appeal said that their judgment did not cover terminable annuities. (4) Here the capital sum has disappeared, and is only brought in as a measure. The mere fact that the capital sum is never at risk does not enable anyone to say that the annuity is not taxable. Nor is this case like *Inland Revenue Commissioners* v. *Ramsay* (5), or *Dott* v. *Brown* (6), where the transactions were in liquidation of a pre-existing debt. They are not repayment of a debt. They are what the annuitant pays to get.

To deduce the legal quality of the payments to the appellant, the contract must be looked at as a whole, including all the consideration which the annuitant was receiving, including his own life annuity which was not limited by the amount of the capital sum he had paid. There is no ground for the submission that at the annuitant's death there arose for the first time a new debt to the appellant of a fixed amount, payable by instalments.

Cyril King K.C. in reply.

Cur. adv. vult.

1940. June 6. LAWRENCE J. read the following judgment: The question in this case is whether certain payments made to the appellant by the Equitable Life Assurance Society of the United States, under a contract called a "refund annuity" entered into between the appellant's brother and the society are annuities within the meaning of the Income Tax Acts and taxable as such. The case was argued before me by agreement on the footing that the appellant was entitled to sue on the contract, this having been the basis on which the case proceeded before the Commissioners. It appears from the authorities cited that annuities or annual payments, whether for life or for terminable periods, may be either of a capital or of a revenue nature: *Perrin* v. *Dickson* (1), and *Inland Revenue Commissioners* v. *Ramsay* (2), (terminable periods); and *Dott* v. *Brown* (3), (life). It is, therefore, necessary to consider whether the payments in question are of a capital or a revenue nature and that can only be discovered from the true construction of the contract. [After setting out the terms of the contract and the contentions of counsel, his Lordship proceeded.]

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(1) 3 H. & N. 769.

(2) (1881) 6 App. Cas. 315; 1 Tax Cas. 287.

(3) [1929] 2 K. B. 85; in C. A. [1930] 1 K. B. 107; 14 Tax Cas. 608.

(4) [1930] 1 K. B. 107, at pp. 119, 124.

(5) (1935) 20 Tax Cas. 79.

(6) (1936) 154 L. T. 484.

In my opinion, it is clear that the contract contemplated that the capital invested should be refunded in any event. That is the form and that is the substance of the contract. It can, in my opinion, make no difference that there was no pre-existing debt. In the case of a contemporaneous loan repayable in instalments there is no pre-existing debt. The only question is whether the contract creates a debt which is repayable. As Watson B. said in *Foley* v. *Fletcher* (4): "an "annuity means where an income is purchased with a sum of "money and the capital has gone and has ceased to exist, "the principal having been converted into an annuity"; and as Rowlatt J. said in *Perrin* v. *Dickson* (5), while approving Watson B.'s dictum: "the substance of the present transaction "is that the appellant does not really adventure his capital." There is, in my opinion, nothing inconsistent with these observations in the dicta of the Lord President in *Coltness Iron Co.* v. *Black*. (6) Here the capital never ceased to exist nor did the appellant's brother ever adventure it, for the contract in express terms guarantees that the capital invested shall be refunded or returned and the payments in question have been made in performance of that guarantee. The argument for the Crown that the payments to the appellant are merely measured by the amount paid by the annuitant and not a refund thereof appears to me to be highly artificial and to give no meaning to the very name of the contract, namely, "refund annuity," or to the words "with continuation "of payments until capital invested has been returned." It is unnecessary for me to decide whether the sums paid to the appellant's brother were capital or revenue. What I decide is that the payments to the appellant were capital. The appeal will be allowed with costs.

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(1) [1929] 2 K. B. 85; in C. A. [1930] 1 K. B. 107; 14 Tax Cas. 608.

(2) 20 Tax Cas. 79.

(3) (1936) 154 L. T. 484.

(4) 3 H. & N. 769, 784–5.

(5) [1929] 2 K. B. 85, 88; 14 Tax Cas. 608, 614.

(6) (1880) 1 Tax Cas. 287, 307–8.

Appeal allowed.

Solicitors for appellant: *Scott & Son.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

J. W. H.

1940
June 7, 10.

JOPLING *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamps—Pecuniary legacy—Appropriation of shares by executor with consent of legatee—Transfer—Whether chargeable as conveyance on sale—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 54—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 41.

The power of appropriation of stocks and shares in satisfaction of a pecuniary legacy with the consent of the legatee, which is conferred on executors by s. 41 of the Administration of Estates Act, 1925, does not differ in any material degree from the power of appropriation which existed before that Act. Such an appropriation still involves a contractual element, and the transfer by which it is carried into effect is chargeable with ad valorem duty as a " conveyance on sale."

Dawson v. *Inland Revenue Commissioners* [1905] 2 I. R. 69 followed; principle of *In re Lepine* [1892] 1 Ch. 210, and *In re Beverly* [1901] 1 Ch. 681 applied.

CASE stated pursuant to the Stamp Act, 1891, s. 13.

On January 19, 1939, six transfers of stock or shares each dated December 30, 1938, by George Gerard Shiel to Joan Izott Jopling and Henry Vesey Casson, were presented on behalf of the appellant, Lindsay Millais Jopling, to the Commissioners of Inland Revenue under the provisions of the Stamp Act, 1891, s. 12, for the opinion of the Commissioners as to the stamp duty with which they were chargeable. The transfers were in common form, and each was stated to be made in consideration of five shillings. George Gerard Shiel, the transferor in each case, was the executor of the will of George William Rowe, who died on September 20, 1938. By that will, which was duly proved, the appellant was given a pecuniary legacy of 5000*l.* free of duty. The will did not contain any power of appropriation. In exercise of the power conferred on him by the Administration of Estates Act, 1925, s. 41 (1), Mr. Shiel, with the consent of the appellant,

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(1) Administration of Estates Act, 1925, s. 41, sub-s. 1: " The "personal representative may appropriate any part of the real or "personal estate, including things "in action, of the deceased in the "actual condition or state of investment thereof at the time of appropriation in or towards satisfaction "of any legacy bequeathed by the "deceased . . . . : Provided that, ". . . . (ii.) an appropriation of

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appropriated towards satisfaction of the legacy of 5000*l.* bequeathed to the appellant the stocks and shares transferred by the transfers which were the subject of this case at the mesne market price of December 30, 1938. The balance of the 5000*l.* legacy amounting to 8*l.* 10*s.* was paid to the appellant in money. The consent of the appellant to the appropriation was given orally on December 5, 1938. A broker's valuation was considered by Mr. Shiel on January 3, 1939, when he decided that it carried out the intentions of the appellant and himself and he accordingly on that day gave instructions for the transfers to be put in hand and thereby made the appropriation. At the request and by the direction of the appellant, the transfers were made to Joan Izott Jopling and Henry Vesey Casson to hold as bare trustees for the appellant.

The Commissioners were of opinion that the transfers presented for adjudication fell within the head of charge " Conveyance or transfer on sale of any property " in Sch. I. to the Stamp Act, 1891, and assessed them with ad valorem duties. The appellant contended that the transfers were not " on sale," but fell within the head of charge " conveyance or "transfer of any kind not hereinbefore described " in the Stamp Act, 1891, Sch. I. The questions for the opinion of the Court were: (1.) Whether the transfers presented for adjudication were liable to duty as assessed by the Commissioners; (2.) if not, to what duty were they liable.

The appellant in person.

Sir William Jowitt S.-G. and *J. H. Stamp* for the Crown.

LAWRENCE J. The question in this case is whether an instrument of transfer of certain shares appropriated by the executor of a will in satisfaction of a legacy left thereby to the appellant is chargeable with stamp duty under s. 54 of

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"property . . . . shall not . . . . "be made under this section "except with the following con- "sents :—(*a*) when made for the "benefit of a person absolutely "and beneficially entitled in "possession, the consent of that "person."

the Stamp Act, 1891, as a "conveyance or transfer on sale." The authorities show that until the Administration of Estates Act, 1925, an appropriation by an executor of a transfer in pursuance of such an appropriation would have been so chargeable. That is in accordance with the Irish case, *Dawson* v. *Inland Revenue Commissioners* (1), which was decided by a Court consisting of Palles C.B., Andrews and Johnson JJ. That case follows *Foster* v. *Inland Revenue Commissioners* (2), and *In re Lepine* (3) and *In re Beverly* (4) were there cited. It was decided in *Dawson* v. *Inland Revenue Commissioners* (1) that where a legatee under a will agrees with the executor to take payment, or part payment, of his legacy in stocks or securities of the testator, the transfer deed executed in pursuance of the agreement is a "conveyance or transfer on "sale" within the meaning of the Stamp Act, 1891, and is chargeable with ad valorem duty. *In re Lepine* (3) and *In re Beverly* (4) had both decided, though not upon the Stamp Acts, that the substance of an appropriation by an executor was that the executor was assumed to have paid the pecuniary legacy in money and the legatee to have paid the money back to the executor for the stocks appropriated, and it was said that the substance of the matter must be looked at.

It is now contended by the appellant that the Administration of Estates Act, 1925, has altered the law with reference to the powers of an executor to appropriate, that s. 41 of that Act gives a new statutory power of appropriation to a personal representative; that, when that appropriation has been made, the conveyance of the property appropriated is not a "conveyance on sale" within the meaning of the Stamp Act, s. 54, because it is, as I understand his argument, a statutory power of appropriation which has nothing contractual in it, and, therefore, the conveyance is not a conveyance on sale, there being no sale or any other contractual element in the transaction. The appellant contends that the required consent is not a contractual consent at all and that it is revocable. He argues that, although the legatee may have certain rights

(1) [1905] 2 I. R. 69.
(2) [1894] 1 Q. B. 516.
(3) [1892] 1 Ch. 210.
(4) [1901] 1 Ch. 681.

against the personal representative as his trustee, yet they are rights of an entirely different nature from those possessed by a purchaser against a vendor, and that their nature indicates that the conveyance which has to be made to give effect to the appropriation is not a conveyance on sale. On the other hand, the Solicitor-General has contended that there was ample consideration for this conveyance on sale, namely, that when the legatee consented to the appropriation he discharged the personal representative or executor pro tanto from his obligation to pay the pecuniary legacy. He relied on *In re Lepine* (1) and *In re Beverly* (2) as showing what the substance of an appropriation was, and that the substance of an appropriation had always been regarded as a sale by the executor to the legatee. In addition to *In re Lepine* (1) and *In re Beverly* (2) he cited *Great Western Ry. Co.* v. *Inland Revenue Commissioners* (3) in which it was held that a transfer in pursuance of an amalgamation agreement which had been confirmed by an Act of Parliament was a conveyance on sale, and *Foster* v. *Inland Revenue Commissioners* (4) (which was followed by the Irish case to which I have alluded), where it was held that a transfer to a corporation from individuals who were partners of stocks and securities which were the property of the partnership in consideration of shares in the new corporation was a conveyance on sale.

In my opinion, the power of appropriation which is conferred by the Administration of Estates Act, 1925, does not differ in any material degree from the power of appropriation which existed before the Act. It appears to me that when the executor makes up his mind to appropriate, and gets the consent of the legatee to that appropriation, there is the element of contract. There is, in my opinion, consideration to support that element of contract, and it makes no difference that the transaction is authorized by statute. The substance of the matter is that the executor proposes an appropriation, and the legatee consents to it, and that the legatee, in consenting, discharges the executor from his obligation to

(1) [1892] 1 Ch. 210.
(2) [1901] 1 Ch. 681.
(3) [1894] 1 Q. B. 507.
(4) [1894] 1 Q. B. 516.

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Lawrence J.

pay the legatee in money. In accordance with the authorities to which I have alluded, that in my opinion, amounts, for the purposes of the Stamp Acts, to a conveyance on sale, and I see nothing in the terms of s. 41 of the Act of 1925, which is inconsistent with that view. For these reasons I dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Trower, Still & Keeling.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. W. H.

COMMISSIONERS OF INLAND REVENUE *v.* IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND), LIMITED.

1940
June 10, 11.

Revenue—National defence contribution—Assessment—Interest on money on current account at bank—" Income received from investments or other property "—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 19, *sub-s.* 1 ; *Sch. IV., para.* 7.

Interest received by a trading company on daily balances at banks at which the company is a customer is " income received " from investments or other property " within the Finance Act, 1937, Sch. IV., para. 7, and, therefore, not assessable to national defence contribution under s. 19, sub-s. 1, of the Act.

Case stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on March 14, 1939, the Imperial Tobacco Company (of Great Britain and Ireland), Ld., appealed against an additional assessment to the national defence contribution in the sum of 160,821*l.* for the period commencing April 1, 1937, and ending October 31, 1937, under s. 19, sub-s. 1, of the Finance Act, 1937. (1) Included in the assessment of 160,821*l.* was a sum of 20,612*l.*, being seven-twelfths of the total amount of bank interest received by the company in the year to October 31, 1937.

The company was a trading company, carrying on the business of manufacturing and selling tobacco. The company's head office was at Bristol, and it had branches in different places, corresponding to the various businesses taken over by the company on its formation. Each branch of the company had its own bank account, the principal bank account of the company, the central account, being operated by the head office. The company received interest at varying rates on the

(1) By Finance Act, 1937, s. 19, sub-s. 1 : "There shall be charged, "on the profits arising in each "chargeable accounting period "falling within the five years "beginning on the first day of "April, 1937, from any trade or "business to which this section "applies, a tax (to be called the "' national defence contribution ' "[at a certain rate]."

By Sch. IV., para. 7 : "Income "received from investments or "other property shall be included "in the profits in the cases . . . . "provided in this paragraph " [which did not include the income in question in the present case].

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INLAND REVENUE COMMISSIONERS v. IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND), LD.

daily balances at the various banks at which it was a customer, the total amount of interest received in the year ending October 31, 1937, being 35,334*l.* 15*s.* 4*d.*

The Commissioners held that this bank interest was "income received from investments or other property," and was, therefore, expressly excluded from the computation of the company's profits for national defence contribution by para. 7 of Sch. IV. to the Finance Act, 1937. They, accordingly, reduced the assessment to 140,209*l.*, and the Crown appealed.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. By Finance Act, 1937, Sch. IV., para. 7, "income received "from investments or other property" is not to be taken into account for the purposes of national defence contribution. Admittedly, none of the exceptions to that provision in para. 7 applies in this case, but it is submitted that bank interest on a current account is not "income received from investments or other property." A good deal of light may be obtained from the excess profits duty cases, which show that "investments" in such a context as this means investments in the ordinary business sense: see *Gas Lighting Improvement Co., Ld.* v. *Inland Revenue Commissioners* (1); *Liberty & Co., Ld.* v. *Inland Revenue Commissioners.* (2) It is quite wrong to describe money lying idle in the bank as an investment. In the company's balance sheet there would be two separate items, "Investments," and "Cash at Bank." The respondents' business happens to require a very large bank balance in cash, but in any ordinary business an auditor would advise the respondents that they had too much cash at bank and as a distinction should invest part of it. The relation of banker and customer is simply that of debtor and creditor and if the bank failed the company would merely be an ordinary creditor for the amount of the debt shown by its balance. In *In re Price* (3) money on deposit account at a bank was held not to pass under a bequest of "pecuniary investments," it being said that the mere fact that money earns interest does not make it an investment. No one in that case suggested that money on current account was an investment. This view is supported by s. 11 of the Trustee Act, 1925. The words "or other property" in para. 7 of Sch. IV. to the Act of 1937, means property of the nature of an investment, such as mortgages or land. By s. 20, sub-s. 1, of the Finance Act, 1937, for the purpose of the national defence contribution, profits are to be computed on the principles on which profits are computed for the purpose of income tax under Sch. D, Case I. For income tax purposes the interest in the present case comes both under Case I. (trading profits) and Case III. (interest on money) of Sch. D, and is, therefore, taxable under both, but since there cannot be double taxation the Crown has the option of taxing under Case I. or Case III.: see *Liverpool and London and Globe Insurance Co.* v. *Bennett.* (1) For national defence contribution it is to be treated as arising under Case I. Finally, this is the first period of national defence contribution. Seven months of the financial year came within the period. The Crown says that the correct way to deal with the accounts is to take, first, the interest for the year, and then seven-twelfths of it.

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(1) [1923] A. C. 723.
(2) (1924) 12 Tax Cas. 630.
(3) [1905] 2 Ch. 55.

Cyril King K.C. and *F. Heyworth Talbot* for the respondents. There is no room for the application of the ejusdem generis rule to the expression "income received from investments or "other property," because a single instance does not make a genus: see *Rex* v. *Special Commissioners of Income Tax. Ex parte Shaftesbury Homes and Arethusa Training Ship.* (2) If, however, the rule does apply, the respondents have in their bank balances property very like an investment in that it is money put out with the bank under a contract that the bank will pay interest on it. Alternatively, this is a question of fact, and there is a finding in favour of the respondents. *In re Price* (3) is not applicable because of the particular collocation of words there "stocks, shares and pecuniary "investments." It is submitted that the interest in the

(1) [1913] A. C. 610.
(2) [1923] 1 K. B. 393.
(3) [1905] 2 Ch. 55.

present case is "income received from investments." There is nothing in *Gas Lighting Improvement Co., Ld.* v. *Inland Revenue Commissioners* (1) to preclude this interpretation. If this interest is not "received from investments," it is received from "other property." Property is what is owned and a vital test of ownership is ability to sue for the recovery of the property. In the present case the respondents could sue the bank for the return of the money if it retained it. An investments need not have any permanent character. Many investments, as of money in short term bonds, are of a very temporary character. By s. 20, sub-s. 1, of the Finance Act, 1937, the profits arising from a trade or business are to be computed for the purpose of the national defence contribution on the principles on which profits are computed for the purpose of income tax under Case I. of Sch. D. The interest in question here, however, would not be chargeable under Case I., but under Case III., and the option of the Crown to charge under either Case would not help them, because that option extends only to chargeability and not to the previous process of computation. [They referred to *Birt, Potter and Hughes, Ld.* v. *Inland Revenue Commissioners.* (2)] Finally, the figure of the assessment was wrong. The actual amount of the interest earned between April 1 and October 31, 1937, should have been charged, not seven-twelfths of the total amount of interest received by the respondents in a year.

R. P. Hills replied.

LAWRENCE J. The question which I have to decide is whether the interest which the respondent company received on its current accounts at its banks is "income received from "investments or other property" within the meaning of the Finance Act, 1937, Sch. IV., para. 7.

The Solicitor-General and Mr. Hills contend that this interest is not income received from investments or other property within the meaning of para. 7, and they rely (inter alia) on *Gas Lighting Improvement Co., Ld.* v. *Inland Revenue Commissioners* (2) in which the House of Lords held, under the similar, but not identical, provision in the Finance Act, 1915, which dealt with excess profits duty, that investments by the company there in question in other companies which competed with it were investments for the purposes of the Finance (No. 2) Act, 1915, the argument on behalf of the company being that they were not investments within the meaning of the Act because their object was to acquire an interest and a certain measure of control in concerns which competed with the company. In that case there is a passage in the opinion of Lord Cave L.C. (1), which appears to me to throw considerable light on the question with which I have to deal. Lord Cave says: "My Lords, I find nothing in the Act which compels "or admits of such a limitation of the meaning of the word "'investments' [as that contended for]. The expression "cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of "that character could in no case be regarded as capital of the "business, and it would be quite unnecessary to direct their "exclusion. It must therefore refer to investments connected "with the business, and I see no reason why it should not "include an investment of part of the business capital in an "outside security, though made with the object of forwarding "the trading operations, for which the business was "constituted." In my opinion, the crucial words for the present purpose there used by the Lord Chancellor are: "in an outside security." That is the limitation which, in my opinion, has to be imposed on the words now under consideration.

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(1) [1923] A. C. 723.

(2) (1927) 12 Tax Cas. 976.

It was contended also for the Crown that *Liberty & Co., Ld.* v. *Inland Revenue Commissioners* (2) also supported the Crown's position. It was there contended by the company that sums of money placed in war loan which would shortly be required by the company to build a shop to be used in its business were not investments because they were only placed in war loan temporarily, but that argument was negatived by the Court of Appeal. That case is perfectly consistent with the view which I have indicated of *Gas Lighting Improvement*

(1) [1923] A. C. 730.

(2) 12 Tax Cas. 630.

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Co., Ld. v. *Inland Revenue Commissioners.* (1) Indeed, it tends against the argument for the Crown in that it recognizes that, no matter how temporary the investment may be, it may still be an investment within the meaning of such an enactment as para. 7.

The other case which was relied on by the Crown was *In re Price* (2), which arose on the construction of a will, the question being whether money on deposit with the testator's bankers, subject to more than twenty-four hours' notice of withdrawal, would pass under a bequest of ready money or under a bequest of pecuniary investments. Farwell J., who decided that money on deposit would not pass under either of those descriptions, said (3): "I think that no one in "ordinary parlance speaking of money which he puts on "deposit account at his bankers at a short call like this—ten "days—taking the usual banker's interest, which is 1 per "cent. below bank rate, would treat himself as making an "investment, or as investing in a mode which could be "intended by him as an investment to be continued after "his death by his trustees 'in its present state of investment' "within the meaning of those words. It is a little difficult "to dogmatize about matters of this sort, and I quite feel "the force of the observation that people do use the words "'invest' and 'investment' nowadays in very odd colloca- "tions. On the other hand, the rules of Court distinguish "between money on deposit and money invested. . . . . The "distinction, to my mind, is really plain. The money which "is deposited with your banker awaits investment: the fact "that it earns interest does not make it an investment. It "is immaterial that it produces interest by being put on "deposit. I think there is a great force in the observation "made by Mr. Upjohn that the fact that it earns interest "cannot make it an investment, because it is quite within "recent times—there may be some banks which do it even "now—that banks have allowed interest on current accounts "if they exceed a certain amount. The result is that in my

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(1) [1923] A. C. 723.

(2) [1905] 2 Ch. 55.

(3) Ibid. 58.

"opinion this sum falls into residue." The Solicitor-General and Mr. Hills contended that the present was an a fortiori case, because in *In re Price* (1) it had been held that even money on deposit account was not invested, but, in my opinion, *In re Price* (1) does not really throw much light on the present case, because it was a decision on the construction of the will, the terms of which threw light on the words "ready money" or "pecuniary investments," which Farwell J. had to construe, and it is impossible, in my view, to argue from the construction of a will such as that was to the construction of this statute.

In addition to those cases, it was contended that there must be some degree of permanence to come within the words "investments or other property," but, in my judgment, that is not consistent with the decision of the Court of Appeal in *Liberty & Co., Ld.* v. *Inland Revenue Commissioners*. (2) It is altogether too vague a criterion, and, in any event, it does not have any bearing on the meaning of the other words which are used, "other property." In my opinion, paıa. 7 of Sch. IV. to the Act of 1937 contrasts investment income with trade profits. I think the words mean, as Lord Cave L.C. seems to have suggested in *Inland Revenue Commissioners* v. *Gas Lighting Improvement Co., Ld.* (3), income derived from sources outside the trade, income produced by money or money's worth not then used in the trade. Money on current account with a bank is not, in my opinion, money which is being used in the customer's business. It is being used in the banker's business. In my opinion, it is impossible to exclude from these words in para. 7 interest which is received from a bank on a current account.

Two other points were argued. It was said that, even if the respondents were wrong on the construction of para. 7, yet this interest did not fall to be taxed within the provisions of s. 19, sub-s. 1, of the Finance Act, 1937, because it did not fall under Case I. of Sch. D to the Income Tax Act, 1918, and was not brought into Case I. of Sch. D by the words in

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(1) [1905] 2 Ch. 55.
(2) 12 Tax Cas. 630.
(3) [1923] A. C. 723.

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s. 20, sub-s. 1, of the Finance Act, 1937: "or would be so "computed if income tax were chargeable under that Case in "respect of the profits so arising." In my opinion, the respondents are wrong on this part of the case, both because such interest as this does fall within Case I. and therefore it is not necessary to have recourse to the words in s. 20, sub-s. 1, of the Finance Act, 1937, and because, if it were necessary to have recourse to those words, it would be covered by them. It was also contended by the respondents that the assessment on the basis of the notional figure of seven-twelfths of the whole year was wrong and that the actual amount of the interest earned in the period April 1 to October 31, 1937, ought to be taken into account. This question depends on the construction of s. 20, sub-ss. 3 and 4, of the Finance Act, 1937, and it is not necessary for me to express an opinion on it. So far as I have considered the matter, it seems to me that the decision of the Commissioners was final on that subject.

On the whole appeal I am of opinion that the decision of the Special Commissioners was right, and that the interest in question was "income received from investments or other "property" within the meaning of para. 7, so that the appeal will be dismissed, with costs.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitor for respondents: *T. M. Sowerby, Bristol.*

G. F. L. B.

KNEESHAW *v.* ABERTOLLI.

1940
June 13.

Revenue—Income tax—Deduction—Monopoly value paid in respect of licensed premises—Licensing (*Consolidation*) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 14.

The sum paid as monopoly value on the grant of a licence in respect of licensed premises is a capital payment, and, consequently, not deductible in an assessment to income tax.

Observation of Scott L.J. in *Appenrodt* v. *Central Middlesex Assessment Committee* [1937] 2 K. B. 48, 68, not adopted.

CASE stated by General Commissioners of Income Tax.

The respondent, the licensee of licensed premises, claimed to deduct from his assessment to income tax the sum of 25*l.*, being one of three annual instalments in respect of the monopoly value of 75*l.* fixed by the justices in granting him a new licence. The Commissioners held that he was entitled to deduct it.

The Crown appealed.

R. P. Hills for the Crown. This was a capital payment, and, therefore, not deductible. The fact that it was an instalment and not the whole monopoly value makes no difference. The question has never been decided in a case under the Income Tax Acts, but the payment has been held to be a capital payment in the following cases dealing with other branches of the law: *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co., Ld.* (1), where Lord Haldane C. said: "Section 14 [of the Finance (1909–10) Act, 1910] deals, "not with the annual value of the licence, but with its capital "value"; *Rex* v. *Customs and Excise Commissioners* (2); and *Rex* v. *Taylor* (3), per Lord Reading C.J. The only doubt in the matter arises from an observation of Scott L.J. in *Appenrodt* v. *Central Middlesex Assessment Committee.* (4) The Divisional Court (5) had agreed that this was a capital payment, but Scott L.J., in the Court of Appeal (which dismissed the

(1) [1913] A. C. 650, 659.
(2) [1914] 2 K. B. 390.
(3) [1915] 2 K. B. 593, 601.
(4) [1937] 2 K. B. 48.
(5) [1936] 2 K. B. 447.

appeal), said (1): "I do not agree that either the instalments or "the lump sum payable . . . . are necessarily capital payments." It is submitted that this was obiter. Lord Wright M.R. and Romer L.J. in that case treated the payment as a capital payment.

The respondent was not represented.

LAWRENCE J. The payment in respect of monopoly value made by the respondent falls to be made under s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910. In all the cases which have been cited to me such a payment has been held to be a payment of a capital sum, but Scott L.J. made certain observations to the contrary effect in *Appenrodt* v. *Central Middlesex Assessment Committee.* (1) Both the other judges in that case, Lord Wright M.R. and Romer L.J., however, treated the sum as being a capital sum. None of the cases has decided the point for the purposes of income tax, but in every case the Courts have for other purposes treated payments for monopoly value as being capital sums.

Under the Act of 1910, on the first application for an annual licence, it is the duty of the licensing justices, under s. 14, sub-s. 1, to settle conditions for securing for the public any monopoly value, and they do that by assessing the whole monopoly value. They also have power under the Act to grant a licence for more than one year and when they do that they are authorized to assess the monopoly value for the number of years for which they are granting the licence. In either case, in my opinion, whether the sum arrived at is for the entire monopoly value on an application for an annual licence, or for a part of the entire monopoly value on an application for a licence for more than one year, the sum assessed by the justices is a capital sum. It may be the whole capital sum, or it may be a part of the capital sum, but the quality of the sum makes no difference, nor does the fact that it is payable in instalments prevent those instalments being capital for revenue purposes.

For these reasons, I am of opinion that the Commissioners took a wrong view, and that the sum of 25*l.* was not deductible under the Income Tax Acts, as it was, in my judgment, a capital sum. The appeal must therefore be allowed.

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(1) [1937] 2 K. B. 48, 68.

Appeal allowed.

Solicitor for appellant : *Solicitor of Inland Revenue.*

W. L. L. B.

1940
April 24, 25,
26, 29.

WODEHOUSE *v.* LEVY AND OTHERS.

Emergency legislation—Street lighting—Metropolis—Repeal by "black-out" legislation of statutory duty to light—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 130*—Lighting (Restrictions) Order,* 1939 (*St. R. & O.* 1939, *No.* 1098), *paras.* 1, 4.

Regulation 1 of the Lighting (Restrictions) Order, 1939, which enacts that no person shall permit any light to be displayed during "black-out" hours, has not repealed s. 130 of the Metropolis Management Act, 1855, under which metropolitan local authorities must cause the streets within their jurisdiction to be well and sufficiently lighted. The obligation under the section still exists to the extent permitted by the regulations.

Hence, where a metropolitan borough council failed to light a street refuge at all, and in consequence the plaintiff was injured, the council were held liable.

ACTION tried by Cassels J.

The plaintiff, P. A. Wodehouse, an infant, suing by his mother as next friend, claimed damages from the defendant Levy, a taxi-cab proprietor, for injuries caused by the alleged negligence of the second defendant, a driver employed by Levy. The first and second defendants alleged that the fault lay with the St. Marylebone borough council for breach of their statutory duty to light the streets, and the council were added as defendants.

On September 1, 1939, the plaintiff hired the taxi-cab at night during "black-out" hours, the lighting of the streets then being restricted by the Lighting (Restrictions) Order, 1939. (1) The taxi-cab came into collision with an unilluminated bollard at the end of a refuge in the middle of the road, and the plaintiff was injured. The borough council pleaded that they had placed on the refuge such lights as were allowed by law, but that they had been extinguished or removed or stolen through no fault of theirs. They also pleaded that the matters complained of only constituted a non-feasance.

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(1) By the Lighting Restrictions Order, 1939 (St. R. & O., 1939, No. 1098): "1. Subject as "hereinafter provided, no person "shall during the hours of darkness cause or permit .... (*b*) any "light, not being a light in a "roofed building, closed vehicle "or other covered enclosure, to "be displayed.

"4. Para. 1 of this Order shall "not apply to the following lights "for the guidance of traffic in "roads .... (*c*) A light in the "head of any illuminated bollard "on an island refuge, provided "that [certain conditions are "fulfilled]. (*d*) Lamps indicating "obstructions upon or near the "carriageway of any road [under "certain conditions]."

Russell Vick K.C. and *Fox-Andrews* for the plaintiff.

Montague Berryman for the first and second defendants. The accident was due to the negligence of, or breach of their statutory duty by, the borough council. Sect. 108 of the Metropolis Management Act, 1855, empowers the council to erect in the carriageway what are now known as refuges, "so as to make the crossings [of the carriageways] less dangerous "for foot passengers." When a refuge has been erected it becomes the duty of the council to light the refuge, in pursuance of the duty created by s. 130 of the Act to well and sufficiently light their streets. That obligation, no doubt, has been modified by the "black-out" regulations, but para. 4 of the Lighting (Restrictions) Order, 1939, specifically excepts from the provision in para. 1 (*b*) (that no person shall cause or permit any light to be displayed) (*c*) "A light in the head "of any illuminated bollard on an island refuge [under certain "conditions] . . . . (*d*) Lamps indicating obstructions upon "or near the carriageway of any road [under certain conditions]." Therefore the statutory duty to light, as so modified, still exists, and in this case there was no light at all. The onus of showing what happened to the lights which the council say they placed on the refuge lies on them, and they have not discharged it. [*Baldock* v. *Westminster City Council* (1) and *Polkinghorn* v. *Lambeth Borough Council* (2) were referred to.]

Edgedale for the borough council. The regulations of 1939, which have statutory authority, repeal the provisions of s. 130 of the Act of 1855 as to lighting, and apart from s. 130 there is no duty on the council to light. Sect. 130 and para. 1 (I.) are so contradictory that they cannot stand together, and the regulation being later in date should prevail. Para. 4 (I.) imposes no duty to light, but merely confers a limited power and is in sharp contrast with s. 130 of the Act of 1855. Even if the council had begun to light the refuge they were not bound to continue to do so: *Sheppard* v. *Glossop Corporation.* (1) This unlighted obstruction was legalized, and therefore it could not be a nuisance: *Great Central Ry. Co.* v. *Hewlett.* (2) When the Legislature wishes to keep a statutory duty in force it says so, as in para. 6 of the Order of 1939 with regard to the lighting of motor-cars. Omission to take adequate precautions against the lamps being stolen is only non-feasance, for which the council is not liable. [*Garnett* v. *Bradley* (3), *Summers* v. *Holborn District Board of Works* (4), *Hesketh* v. *Birmingham Corporation* (5), and Home Office memoranda on Lighting (6) were also referred to.]

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(1) (1918) 120 L. T. 470; 88 L. J. (K. B.) 502.

(2) (1938) 54 Times L. R. 345.

CASSELS J. read the following judgment in which, after stating the above facts, he continued: The council placed the refuge with which the taxi-cab collided in the middle of the road by virtue of powers conferred on them by s. 108 of the Metropolis Management Act, 1855.

By s. 130 of that Act: "Every vestry and district board shall "cause the several streets within their parish or district to be well "and sufficiently lighted, and for that purpose shall maintain, "or set up and maintain, a sufficient number of lamps in every "such street, and shall cause the same to be lighted with gas "or otherwise, and to continue lighted at and during such times "as such vestry or board may think fit, necessary, or proper; "and all public lamps, and the lamp posts and lamp irons and "fittings thereof, to be provided by any vestry or district "board, shall vest in such vestry or board."

This is not the first time that the lighting of streets has been restricted by reason of war. During the war of 1914–1918 there were lighting restrictions and these two sections of the Metropolis Management Act, 1855, and the common law duty of the metropolitan borough councils, came up for consideration in the Court of Appeal in *Baldock* v. *Westminster City*

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(1) [1921] 3 K. B. 132.
(2) [1916] 2 A. C. 511.
(3) (1878) 3 App. Cas. 944.
(4) [1893] 1 Q. B. 612.
(5) [1924] 1 K. B. 260.
(6) 36 L. G. R., Part II., p. 142; 37 L. G. R., Part II., pp. 501, 505.

Council. (1) There a tax-cab driver had driven his cab on to an unlighted refuge and suffered damage. The case first came in the county court before a jury, who found negligence on the part of the defendants in omitting to maintain a danger lamp on the refuge. The county court judge, however, entered judgment for the defendants on the ground that there was no evidence of negligence. The Divisional Court (Lush and Bailhache JJ.) allowed the plaintiff's appeal, whereupon the defendants appealed to the Court of Appeal. Bankes L.J. said (2): "With regard to the duty the position appears to be this: "The defendants are, under s. 130 of the Metropolitan [*sic*] "Management Act, 1855, under a duty with regard to lighting "the streets, and by s. 108 they have the power conferred upon "them of placing fences and posts and arches upon the foot-"ways, carriageways, and so forth, and of placing posts or "other erections in any carriageway, so as to make the crossing "thereof less dangerous. They have, therefore, under those "two sections power and a duty imposed upon them. Under "that power they have the right to erect this particular shelter, "and the statute imposes no special duty upon them to light "it, but does impose upon them the general duty to cause the "streets within their district to be well and sufficiently lighted, "and I should say prima facie that that duty included a duty "to provide sufficient light to indicate the position of any "obstructions which they place in the street under the powers "conferred upon them by s. 108." In *Carpenter* v. *Finsbury Borough Council* (3), Shearman J. held the council liable in damages for the death of a post office van driver who was crushed by the roof of an arch in a street along which he was driving owing to the lighting being insufficient to give notice of the existence and height of the archway. This accident, it is to be noted, happened in March, 1918, during lighting restrictions. The same section of the Metropolis Management Act, 1855, and the common law duty of local authorities with regard to lighting came up for consideration in *Polkinghorn* v. *Lambeth Borough Council* (4), which was an appeal from a

(1) 120 L. T. 470.
(2) Ibid. 471.
(3) [1920] 2 K. B. 195.
(4) 54 Times L. R. 345.

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county court. A refuge had been erected in the road for the convenience of tramway car passengers. At each end was an illuminated bollard. The lighting in one of the bollards went out prematurely and the plaintiff was injured in the early morning by coming into contact with one of them. Slesser L.J. said (1): " Under s. 108 of the Metropolis Management Act, 1855, it was made lawful for every "vestry and district board—and the Metropolitan Borough "of Lambeth are inheritors of the powers of those vestries "and district boards—from time to time to place erections "in the carriageway in order to make crossing the road less "dangerous for foot passengers, and to put up posts, rails and "fences, and the like. There is no doubt that the defendants "had ample and sufficient power to erect this island and to "place the bollard at the end of it. Having utilized their "statutory right to place the refuge and bollard in the highway "they, being—in the words of Lord Wrenbury in *Great Central* "*Ry. Co.* v. *Hewlett* (2) 'clothed with a statutory power to do "'an act must in doing it exercise reasonable care to prevent "'injury to others.' The county court judge has found that "the defendants failed to exercise that reasonable care because "they have failed to keep lighted the lamp which would have "shown a driver on the highway that the bollard was present. "In my opinion, that finding of the judge is fatal to the "appellants' contention here. The obligation, so long as the "bollard is in the street and the hour is dark, is to keep it "lighted, and they have failed so to do."

Scott L.J. said (3), after stating the facts: " In those "circumstances the legal position is, in my opinion, a very "simple one. It is that, whether the case be regarded "from the point of view of statutory duty, or from that "of common law negligence, the failure to maintain the "light was, in either case, all that it was necessary for "the plaintiffs to prove to establish their right to damages, "unless, after that evidence, the defendant council gave "affirmative evidence to discharge the onus which was put

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(1) 54 Times L. R. 345, 346.

(2) [1916] 2 A. C. 511, 525.

(3) 54 Times L. R. 345, 347.

"on them of disproving their liability for the accident." Farwell J., also a member of the Court, preferred to deal with the case as one of negligence rather than a case of breach of statutory duty.

Mr. Edgedale, for the third defendants, referred to *Great Central Ry. Co.* v. *Hewlett* (1), but that case arose in very unusual circumstances. The railway company had erected a gate post in the public highway in contravention of their special Act. In 1901 this was judicially held to be an obstruction. The following year the railway company obtained an Act which legalized the existence of the gate post and it was held that the mere power to maintain the post imposed no obligation on the company to take reasonable precautions to warn the public of its existence. The railway company, as Lord Sumner pointed out (2), were not the lighting authority for the area where the post was, nor were they under any express obligation to light. Mr. Edgedale relied also on *Sheppard* v. *Glossop Corporation* (3), where the plaintiff, going home at night, missed his way, strayed on some private land, fell over a retaining wall into an unlighted street and was injured. This street was lighted by the defendants, but the lights were extinguished every night at 9 P.M. and it was after this hour that the plaintiff suffered damage. It was held that the defendants had done nothing to make the street dangerous, and in so far as they lighted the streets they did so under s. 161 of the Public Health Act, 1875, which conferred on them a discretion but not an obligation to light.

It was contended by Mr. Edgedale that the Lighting Restrictions) Order, 1939, had repealed the duty of the local authority to light streets under s. 130 of the Metropolis Management Act, 1855. I am unable to accept that view. The prohibition of lights in para. 1 is expressly stated in para. 4 not to be applicable to lamps indicating obstructions if they comply with certain requirements. The third defendants, therefore, cannot shelter themselves behind the Lighting (Restrictions) Order, 1939, for not lighting this obstruction.

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(1) [1916] 2 A. C. 511.
(2) Ibid. 522.
(3) [1921] 3 K. B. 132.

The Order has certainly modified the duty as expressed in the statute "to cause the several streets within their parish or "district to be well and sufficiently lighted," but it has not abolished the duty to light obstructions in the streets which is founded both on the statute and on the common law, as the decided cases show.

The present lighting restrictions do not relieve the metropolitan local authorities from lighting obstructions such as refuges in the streets. So long as these restrictions remain in their present form the duty of the authorities is to indicate such an obstruction during darkness by lamps which do not offend against para. 4 (*d*) of the order. Where the obstruction is in the nature of an illuminated bollard on an island refuge, that should have a light in accordance with para. 4 (*c*) of the same order.

Mr. Edgedale's final contention was that at most the third defendants were guilty of non-feasance and are not liable. I am unable to accede to this argument. Non-feasance in its usual, and probably its strict, applicability belongs to a highway authority and this action has nothing to do with the non-repair of a highway. Failure to exercise powers, but not duties, conferred by statute creates no liability. That, too, is non-feasance. The incompetent exercise of these powers is another matter : see per Slesser L.J. in *Kent* v. *East Suffolk Rivers Catchment Board.* (1) In the same case MacKinnon L.J. said (2) : "A public authority that is empowered to do a thing, "but not ordered to do it, may with impunity abstain from "doing anything." Here the third defendants were under a statutory duty to light the streets and under a statutory and common law duty to light obstructions. It would be fantastic to say that they might light some obstructions and not others, or might light an obstruction one night and not light it the next, and then say that their failure to light was non-feasance. I am compelled to reject the argument.

I find, therefore, that the defence of the third defendants fails on all grounds. They were guilty of a breach of duty both statutory and at common law in negligence in failing on

(1) [1940] 1 K. B. 319, 328.

(2) Ibid. 329.

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the night in question to light this obstruction on the road. That was the principal cause of the damage suffered by the plaintiff, and he is entitled to recover damages against them.

His Lordship then dealt with the evidence, and found that the driver was negligent, and gave judgment for the plaintiff for 275*l.* agreed damages.

Judgment for plaintiff.

Solicitor for plaintiff: *F. J. Stewart.*

Solicitors for first and second defendants: *A. D. Vandamm & Co.*

Solicitor for borough council: *William Charles Crocker.*

W. L. L. B.

C. A.
1940
June 10, 11.

LEE AND ANOTHER *v.* PROPRIETORS OF HAY'S WHARF, LIMITED.

County court—Action in county court under Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42)*—Concurrent common law action in High Court—Removal of county court action into High Court—Discretion—County Courts Act,* 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 111, *sub-s.* 1.

Where an action is brought in the county court under the Employers' Liability Act, 1880, s. 6, and a concurrent action is brought at common law in the High Court, the County Court Act, 1934, s. 111, sub-s. 1, gives to the High Court or a judge thereof an absolute discretion to order the removal into the High Court of the proceedings in the county court if the Court or judge thinks it desirable.

Munday v. *Thames Ironworks and Shipbuilding Co., Ld.* (1882) 10 Q. B. D. 59, was decided under powers contained in the County Courts Act, 1846, s. 90, and is not now a binding authority.

APPEAL from Stable J. reversing the decision of a Master who had ordered the removal into the High Court of an action begun in the county court under the Employers' Liability Act.

In April, 1940, the plaintiffs, Rosina Lee and another, suing as administrators of the estate of John Edward Lee, deceased, brought an action in the Southwark County Court for the benefit of the plaintiff, Rosina Lee, and of Peter Lee, the adopted son of Rosina Lee and John Edward Lee, deceased. The action was brought under the Employers' Liability Act, 1880, for damages for negligence against the defendants at whose wharf John Edward Lee had been employed as a fitter. The particulars of claim stated that on October 12, 1939, John Edward Lee died as the result of injuries received on the same day from the fall of a lift in the shaft of which he was working. The plaintiffs alleged that the accident was due to the lift being inadequately secured by the defendants or their servants. The plaintiffs also brought an action at common law in the High Court against the same defendants for damages arising out of the death of J. E. Lee, on the same facts.

On May 7, 1940, an application was made by the plaintiffs under the County Courts Act, 1934, s. 111, sub-s. 1, for the county court action to be removed into the High Court, on the ground that the issues were difficult, and that the action at common law would properly be heard in the High Court before the county court action. On May 9, 1940, the Master made an order for removal into the High Court, but on May 24, 1940, it was reversed by Stable J. The plaintiffs now appealed from this order to the Court of Appeal. The appeal was heard on June 10, 11, 1940.

H. H. Harris for the plaintiffs. The order appealed against was wrong. Stable J. took the view that he was compelled to make it by the decision in *Munday* v. *Thames Ironworks and Shipbuilding Co., Ld.* (1), where it was held that the Court ought to exercise the power to remove a case into the High Court only in exceptional circumstances. But that decision turned on the wording of s. 90 of the County Courts Act, 1846 (9 & 10 Vict. c. 95), which provided that no action should be removed into a superior court save on certain conditions. (2) The terms of that section are totally different from the much wider words of the enactment applicable to the present case, namely, s. 111, sub-s. 1, of the County Courts Act, 1934, which gives the Court or a judge power to order the removal of proceedings "if the High Court or judge thereof thinks it "desirable." In other words, the prevailing enactment gives the Court or a judge complete discretion in the matter and *Munday* v. *Thames Ironworks and Shipbuilding Co., Ld.* (1), is no longer law.

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(1) (1882) 10 Q. B. D. 59.

(2) By County Courts Act, 1846, s. 90: "No plaint entered "in any court holden under this "Act shall be removed or re- "movable from the said court "into any of Her Majesty's "superior courts of record by any "writ or process, unless the debt "or damage claimed shall exceed "5*l*., and then only by leave of a "judge of one of the said superior "courts, in cases which shall "appear to the judge fit to be "tried in one of the superior "courts; and upon such terms ". . . . . as he shall think fit."

By County Courts Act, 1934, s. 111, sub-s. 1: "The High "Court or a judge thereof may "order the removal into the High "Court, by writ of certiorari or "otherwise, of any proceedings "commenced in a county court, "if the High Court or judge "thereof thinks it desirable that "the proceedings should be heard "and determined in the High "Court."

Monier-Williams for the defendants. The order was right. Sect. 6 of the Employers' Liability Act, 1880, provides that every action for recovery of compensation under the Act shall be brought in a county court, "but may . . . . be "removed into a superior Court." That is a plain statutory provision that the action shall be tried in a county court unless unusual circumstances are proved. The Court should be "slow to remove an action [under the section] unless under "such special circumstances as are not very likely to arise "in cases of this kind, but which may arise exceptionally": per Manisty J. in *Munday* v. *Thames Ironworks and Shipbuilding Co., Ld.* (1) Here there are no special circumstances and no "difficult questions of law" to be decided, nor is there "a "considerable amount of expert evidence," and the case should, therefore, be tried in the county court: see per Lopes L.J., in *Potter* v. *Great Western Colliery Co., Ld.* (2)

H. H. Harris replied.

MacKinnon L.J. I gather that if Stable J. had not felt that he was bound by authority, he would have been of opinion that the Master's order was right, but his attention was drawn to *Munday* v. *Thames Ironworks and Shipbuilding Co., Ld.* (3), where, on a similar application to that in the present case, Manisty and Denman JJ. held "that the "power of removal into the High Court of such a county "court action as we are dealing with here ought only to be "exercised in exceptional cases." The judges there acted under the powers given to them by s. 90 of the County Courts Act, 1846. The rigour of that section has since been much lessened, first by s. 126 of the County Courts Act, 1888, which did not start with a prohibition, but with a permission, thus: "It shall be lawful for the High Court or a Judge thereof to "order the removal into the High Court, by writ of certiorari "or otherwise, of any action or matter commenced in the "court under the provisions of this Act, if the High Court "or a Judge thereof shall deem it desirable that the action

(1) 10 Q. B. D. 59, 61.
(2) (1894) 10 Times L. R. 380.
(3) 10 Q. B. D. 59.

"or matter shall be tried in the High Court," on such terms as it was thought fit to impose. The wideness of discretion given to judges in that section has, if possible, been bestowed in even broader terms in the present effective enactment, namely, s. 111, sub-s. 1, of the County Courts Act, 1934. It is, perhaps, relevant also to observe that in *Challis* v. *Watson* (1), where the section concerned was that of the Act of 1888, it was held that the High Court had "an absolute "discretion . . . . to consider, having regard to all the circum-"stances, whether it is desirable that the action should be tried "in the High Court or remain in the county court."

In these circumstances, it seems to me that the decision in *Munday* v. *Thames Ironworks and Shipbuilding Co., Ld.* (2), ought not now to be treated as a binding authority preventing a judge from exercising, in the case of proceedings in the county court under the Employers' Liability Act, 1880, and a concurrent action at common law in the High Court, the absolute discretion which he is now given. I think that Stable J. was not prevented by that decision (2) from exercising his discretion in the way in which the Master did, and in the way in which the learned judge desired to do. That being so, this appeal should be allowed.

CLAUSON L.J. I agree.

Appeal allowed.

Solicitors for appellant: *J. S. I. Rabin.*
Solicitors for respondents: *Clifford-Turner & Co.*

(1) [1913] 1 K. B. 547. (2) 10 Q. B. D. 59.

F. P. F.

C. A.

1940

April 25, 26; May 9.

WILKINSON *v.* CHETHAM-STRODE.

Highway—Pedestrian crossing place—Precedence of foot passengers over vehicular traffic—Duty of driver approaching crossing—Transit across road divided by refuge—Single crossing or two separate crossings—Contributory negligence—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 (*dated January* 25, 1935), *reg.* 5.

The plaintiff left the western pavement of a road and started to go over a controlled pedestrian crossing when the traffic lights were in his favour and against the defendant's car, but before he reached a refuge which was on the crossing in the middle of the road, the lights changed and the defendant received a signal that she might proceed over the crossing between the refuge and the eastern pavement of the road. The plaintiff paused at the refuge and then stepped into the roadway in front of the defendant's car which knocked him down. In an action for damages for personal injuries the plaintiff alleged that the defendant had been guilty of negligence and breach of the statutory duty imposed on her by reg. 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, in that she had not allowed him free and uninterrupted passage over the crossing, he having started to go over the crossing, which must be regarded as a single crossing from pavement to pavement, although divided by the refuge, before she had received a signal that she might proceed over the crossing. The defendant denied negligence and contended that there were two crossings, one from the western pavement to the refuge and the other from the refuge to the eastern pavement, and that she was not in breach of her statutory duty because the defendant had not started to go over the crossing where the accident took place before she received a signal to proceed.

It was found as a fact that neither the plaintiff nor the defendant used reasonable care having regard to the peculiarities and dangers of the crossing. Asquith J. held that the whole transit from pavement to pavement was a single crossing, and not two crossings, but that the plaintiff ceased to be on the crossing when he reached the refuge, which was a separate entity from the crossing so that when he stepped from the refuge into the roadway without using due care he was both capable and guilty of contributory negligence and the defendant was entitled to succeed:—

Held, by the Court of Appeal that the whole transit from pavement to pavement was not a single crossing but was two separate crossings, interrupted by a refuge, and that as the lights had changed from green to red before the plaintiff left the refuge to cross to the eastern pavement, he was guilty of contributory negligence and could not recover.

Decision of Asquith J. [1940] 1 K. B. 309 affirmed on other grounds.

APPEAL from the decision of Asquith J. (1)

On July 10, 1938, the plaintiff was crossing from west to east, Artillery Row, Westminster, S.W., on a pedestrian crossing close to the junction of Artillery Row and Victoria Street, when he was knocked down by the defendant's motor-car and injured. The learned judge held that the crossing was a crossing at a road intersection, where traffic was controlled by light signals within reg. 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935. (2)

In the middle of Artillery Row at that point was a refuge consisting of three sections of paved surface raised above the level of the carriage way, the middle section carrying an electric lamp standard and the other two sections each carrying a pylon. Between each section was a gap of unpaved roadway, about four feet wide, so that a pedestrian could cross Artillery Row by either of those gaps without mounting the paved parts of the refuge, but continuing throughout on the level of the carriage way. A pedestrian so crossing would have on his left a line of metal studs extending from the western pavement to the northern end of the refuge and continuing thence to the eastern pavement, and on his right a metal "stop" line extending from the western pavement to the southern end of the refuge, and a line of studs thence to the eastern pavement.

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(1) [1940] 1 K. B. 309.

(2) By the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 (dated January 25, 1935) :—

"Reg. 3. The driver of every "vehicle approaching a crossing "shall, unless he can see that "there is no foot passenger "thereon, proceed at such a speed "as to be able if necessary to "stop before reaching such "crossing."

"Reg. 4. The driver of every "vehicle at or approaching a "crossing where traffic is not for "the time being controlled by a "police constable or by light "signals shall allow free and "uninterrupted passage to any "foot passenger who is on the "carriageway at such crossing, "and every such foot passenger "shall have precedence over all "vehicular traffic at such cross-"ing."

"Reg. 5. The driver of every "vehicle at or approaching a "crossing at a road intersection "where traffic is for the time being "controlled by a police constable "or by light signals shall allow "free and uninterrupted passage "to every foot passenger who has "started to go over the crossing "before the driver receives a "signal that he may proceed over "the crossing."

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The road junction was controlled by four traffic lights working automatically in conjunction—two showing east and west along Victoria Street, and two showing north and south along Artillery Row and Buckingham Gate, which led into Victoria Street from the north almost opposite Artillery Row—so that the lights facing north and south were red when those facing east and west were green, and vice versa.

Asquith J. found that the plaintiff left the western side of Artillery Row when the traffic lights were green in his favour. He reached the refuge, paused in the southern space between raised sections of the refuge, and then stepped forward towards the eastern pavement of Artillery Row. The defendant, who had driven her car southwards down Buckingham Gate, had been halted at the junction of Buckingham Gate and Victoria Street by a red light against her. That light turned green in her favour (and consequently red against the plaintiff), when the plaintiff was between the western pavement of Artillery Row and the refuge. The defendant moved forward across Victoria Street, entered Artillery Row, and her car struck the plaintiff when he was some steps from the refuge towards the eastern pavement of Artillery Row.

The plaintiff brought the present action, claiming damages for the injuries received by him, which, he alleged, was due to the defendant's negligence and/or breach of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935. The defendant denied negligence or breach of duty, and, alternatively, pleaded contributory negligence.

Asquith J. held that the whole transit from pavement to pavement was a single crossing, and not two crossings, but that the plaintiff ceased to be on the crossing when he reached the refuge, which was a separate entity from the crossing, and stepped into a space enclosed by the contours, so that, when he stepped from the refuge into the roadway without using due care, he was both capable and guilty of contributory negligence, and that therefore the defendant was entitled to succeed.

The plaintiff appealed. The appeal was heard on April 25, 26, 1940.

Cyril Salmon for the appellant. In the present case the learned judge held that there was only one pedestrian crossing across the entrance to Artillery Row. The defendant under reg. 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, was under a statutory obligation to give free and uninterrupted passage to the plaintiff as he had started to go over the crossing when the traffic lights were in his favour and against the defendant. The fact that there is a refuge in the middle of the crossing does not make any difference in that obligation. There is a difference between the language of regs. 4 and 5. In reg. 4 the obligation of the driver is to give "free and uninterrupted passage to any foot passenger "who is on the carriage way at such crossing," whereas in reg. 5 the words "on the carriage way" are omitted and the obligation of the driver is to give "free and uninterrupted "passage to every foot passenger who has started to go over "the crossing." The defendant was guilty of a breach of that statutory obligation, and it was decided in *Bailey* v. *Geddes* (1) that she cannot rely upon the defence that the plaintiff had also been guilty of contributory negligence. In that case Slesser L.J. said (2): "Now if his duty is to stop "it is physically impossible in such a case that the cause of the "accident can be the negligence of the plaintiff, because ex "hypothesi the defendant, if he has done his duty, has already "stopped," and later: "If the obligation on the driver of the "vehicle under the regulations is to stop outside the crossing "it is impossible that what is done inside the crossing can "be the fault or the negligence of the plaintiff himself, because "if the regulations had been obeyed, there would have been "no car upon the crossing at all which could, on any view, have "injured the plaintiff. For these reasons, I think that, "while the doctrine of contributory negligence may "apply in appropriate cases, the language of these "particular regulations, when a breach of them has been "committed, makes it impossible for the driver of the "offending vehicle to rely on contributory negligence." Scott L.J. also said (3): "I entirely agree with what

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(1) [1938] 1 K. B. 156.

(2) Ibid. 166.

(3) Ibid. 167.

"Slesser L.J. has just said, that the idea of a plea of "contributory negligence is fundamentally inconsistent with "the very basis of the Regulations." The defendant also failed to comply with the duty imposed by reg. 3, because she failed to proceed at such a speed as to be able to stop before reaching the crossing across which the plaintiff was proceeding.

Cartwright Sharp K.C. and *Armstrong Jones* for the respondent. In the present case there are two crossings within the meaning of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, one from the east side of Artillery Row to the refuge, the other from the refuge to the west side of Artillery Row. The lights had changed from green to red before the plaintiff started to cross from the refuge to the east pavement of Artillery Row, and therefore he was guilty of contributory negligence. There is no greater obligation in the case of a breach of a statutory regulation than in the case of a breach of any other duty. The case is covered by the decision of the Court of Appeal in *Chisholm* v. *London Passenger Transport Board.* (1) In that case Scott L.J. said: "If the pedestrian "suddenly embarks on an empty crossing so as to embarrass "a car which has come quite close and thereby causes or "contributes to a collision, he has only himself to blame and "the driver is under no liability to him for the consequences." The learned Lord Justice pointed out (2) that "The primary "purpose of Reg. 5 is to prevent motor traffic, which has been "temporarily held up either by the arm of the police constable "or by the red or red and amber lights, rushing forward on "the wave of the arm or the change from red and amber to "green, before the pedestrians on the crossing have had time "to get into safety." Alternatively, if the proper view be that there is only one crossing across the entrance to Artillery Row, then there is in the middle of the crossing a zone of safety, namely, the refuge, to which the regulations cannot be said to apply, and therefore when reg. 5 says that free and uninterrupted passage is to be given to every foot passenger who has started to go over the crossing, that must be understood to mean started to go into the area of danger, and the obligation

(1) [1939] 1 K. B. 426, 438.

(2) Ibid. 433.

ceases when the foot passenger reaches the refuge which is a zone of safety, and an entirely fresh obligation on the part of the driver arises when the pedestrian starts from the other side of the refuge to complete the transit. *Bailey* v. *Geddes* (1) is not applicable on the facts of this case because in that case there was no refuge in the middle of the road.

Cyril Salmon replied.

Cur. adv. vult.

1940. May 9. The following judgments were read.

SLESSER L.J. In this case, the plaintiff sued the defendant for damages alleged to have been sustained by the negligent driving of the defendant of a motor-car or, alternatively, damages sustained by him through her breach of statutory duty. The statutory duty which it is said the defendant has broken is that imposed by regs. 3 and 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, made by the Minister of Transport under s. 18 of the Road Traffic Act, 1934. The defendant contends that the plaintiff was guilty of contributory negligence.

In so far as, having read the evidence in the case, I see no reason to differ from the findings of fact of the learned judge in his judgment, I re-state them so far as they are material for the purpose of this appeal: "The accident occurred on the "10th July, 1938, at 4.30 P.M. at the junction of Artillery "Row and Victoria Street. Westminster. The plaintiff at "that time was walking along the southern pavement of "Victoria Street from west to east, making for Horseferry "Road. This involved crossing the mouths of a number of "streets running into Victoria Street from the south. Of "these Artillery Row was one. Opposite the mouth of Artillery "Row and running into Victoria Street from the north is "Buckingham Gate. In the middle of the mouth of Artillery "Row is a refuge or island. A common type of island consists "of an oval area of pavement with a pylon near each end and "an electric lamp standard in the middle. The present island

(1) [1938] 1 K. B. 156.

"diverged from this common type to the extent that, instead "of consisting of a continuous paved surface, all of it raised "above the level of the carriageway, it consisted of three "sections of such paved surface, the middle one carrying the "lamp standard, and the other two, to the north and south of "it, carrying the two pylons. Between the section carrying "the lamp standard and the section carrying the pylons, each "side of it, there were gaps of unpaved roadway, gaps about "four feet wide. Hence a pedestrian could cross the mouth of "Artillery Row via either of these gaps without mounting the "raised parts of the island at all, but remaining throughout "on the level of the carriageway. A pedestrian so crossing "would have on his left a line of metal studs extending from "the western pavement to the northern end of the island, and "extending from thence to the eastern pavement. He would "have on his right a metal ' stop ' line extending to the southern "end of the island, and from thence a line of studs going to "the eastern pavement.

"The mouth of Buckingham Gate is considerably narrower "than that of Artillery Row, being about the same breadth "as the western half of that street, and lying opposite such "western half. The longitudinal axis of the island points not "to the middle of the mouth of Buckingham Gate, but at the "pavement east of Buckingham Gate at the point where there "are traffic lights on that pavement. Hence a pedestrian "standing on or at the level of the island, in order to see a "vehicle in the mouth of Buckingham Gate, would have to "look, not merely to his left, but somewhat to his left rear; "and if he were standing at the southern end of the island or "in its southernmost gap, and if such a vehicle moved from "Buckingham Gate and crossed Victoria Street, the lamp "standard and northern pylon would obstruct his view of "such a vehicle during most of its transit unless, indeed, "on leaving Buckingham Gate the vehicle swung sharply "outwards to its left and entered Artillery Row with a wide "sweep.

"This road junction is controlled by traffic lights. Two of "these show east and west along Victoria Street. One of "these two is on the northern pavement of Victoria Street "and west of the junction, the other on the southern pavement "of Victoria Street and east of the junction. The other two "lights show north and south along Artillery Row and "Buckingham Gate. One is on the western pavement of "Artillery Row south of the junction; the other on the eastern "pavement of Buckingham Gate north of the junction. These "four lights work automatically in conjunction, that is, the "lights facing north and south are red when those facing east "and west are green, and vice versa.

"The plaintiff's account of the accident is as follows: "He says that just before he stepped off the pavement to "cross Artillery Row from west to east he saw the traffic "light opposite him was green in his favour; he glanced to "right and left, saw no traffic, and walked ahead to the right "hand, that is, the southernmost gap in the island and proceeded "straight through that gap without pausing. As he reached "the island he says he again noticed that the light opposite "him was green. He had gone perhaps two or three steps "from the island on to the second half of the crossing when he "was struck on the outside of the left leg by the defendant's "car. He received a violent blow on the left shoulder from "it, was spun round to his right, and fell with his forehead "against a section, one of the raised pylons, of the island, "fracturing his skull and sustaining other injuries.

"The defendant's version was that she was driving her "car, with a friend sitting on her left, southwards down "Buckingham Gate. She was halted at the stop line near its "mouth by the traffic light level with that stop line, and on "her left, which was red and against her. She changed gear "while this light was at amber, and moved forward across "Victoria Street towards Artillery Row when it turned green. "She was half-way across Victoria Street when she first saw "the plaintiff on the refuge, or in one of its gaps, looking, as "it seemed, towards his left, and, as she thought, towards "her car. As he did not move, she assumed he was waiting "for her to pass, and she moved on. As she passed the island— "and she had to pass rather close to it, because there was on

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"her left and a little beyond it a stationary car drawn up at "the side of the road—she felt a bump as of an impact on the "side of her car behind the level of her head. Her passenger, "Miss Richards, in substance confirms her account of the "accident. In addition, Miss Richards saw what the "defendant did not: she saw the plaintiff start to cross the "mouth of Artillery Row before the lights turned to green for "the defendant, and, therefore, whilst the plaintiff's lights "were green in his favour, and she confirms the plaintiff's "story to this extent, that he had started to cross when the "lights were in his favour.

"If the plaintiff is right in saying that he still had a green "light in his favour when he reached the island, the defendant "must have crossed most of Victoria Street with a red light "against her. I am satisfied that she did not do this. I "am also satisfied that the light facing the plaintiff, unnoticed "by him, had changed to red when he had only advanced a "few steps from the pavement towards the island, and "before he had reached the island itself. I think it probable "that he paused in the southern gap of the island, and then "moved forward into the path of the car.

"The accident, in my view, was due to the failure of both "parties to make allowance for the imperfect alignment of "Buckingham Gate with Artillery Row. The effect of the "configuration of these two streets, together with the greater "breadth of Artillery Row, was, in the circumstances, to "screen from each other a car crossing from Buckingham "Gate and a pedestrian standing at or near the southern "end of the island, unless, as I have said, the car swung well "out to its left immediately on emerging from Buckingham "Gate. In reply to a question of mine, the defendant said "that the car did not make a wide sweep of this sort. If so, "she would tend not to see the plaintiff, nor would he see "her till she was very close indeed. The defendant, I think, "though travelling at a modest speed, emerged suddenly from "behind the northern section of the island as the plaintiff, "having earlier looked to his left, but not far enough to his "left, also suddenly emerged from the southern end of the island, "stepping from its shelter on to the crossing right in front of "her wheels. I think she was mistaken in thinking that he "was looking at the car as it approached. If he had been, "he would have seen it and avoided it; nor, to a careful "inspection, do I think he would have appeared to have been "looking at it. I do not find that the plaintiff allowed the "bonnet and the front part of the car to pass him and then "stepped into the side of the car, as was suggested on behalf "of the defendant, and I accordingly find that neither party "was using reasonable care, having regard to the peculiarities "and dangers of this particular crossing, which reasonably "vigilant persons would have appreciated and made provision "for. I also find that the negligent conduct of the defendant "and the plaintiff was substantially simultaneous, and leaves "no room for the operation of the rule of last opportunity."

This conclusion of the learned judge, that neither party was using reasonable care, would determine this case in favour of the defendant were this to be a case where no question of pedestrian crossings, made in accordance with statute and regulations thereunder arose. But it is here contended, on behalf of the plaintiff, that the defence of contributory negligence is not open to the defendant by reason of the application to this case of the decision in this Court in the case of *Bailey* v. *Geddes* (1), where the facts were that a collision occurred between a foot passenger who was crossing a road by a pedestrian crossing (though in that case one not controlled by light signals) and a motor vehicle. The plaintiff was knocked down and injured by a motor-car as he was about to step upon the far kerb, having nearly traversed the whole crossing. As has been said, he was fairly and squarely on the crossing. It was held that the driver of the motor-car was liable as the cause of the accident was the failure of the driver to observe the statutory regulations and that a plea of contributory negligence on the part of the foot passenger on the particular language of the regulation was not open as a defence to the driver of the motor-car. As Scott L.J. said (2): "I entirely agree with "what Slesser L.J. has just said, that the idea of a plea of

(1) [1938] 1 K. B. 156.

(2) Ibid. 167.

"contributory negligence is fundamentally inconsistent with "the very basis of the Regulations." I said (1) referring to reg. 3: "If the obligation on the driver of the vehicle "under the Regulations is to stop outside the crossing it is "impossible that what is done inside the crossing can be the "fault or the negligence of the plaintiff himself." This view depended not upon any general principle but was based solely on the actual language of the regulations then applicable, namely, Nos. 3 and 4.

On the other hand, where a pedestrian suddenly stepped from the footpath on to the crossing when a motor vehicle had approached so near to the crossing that it was clearly unsafe and careless to do so, it has been held that the defendant may escape his liability by proving the contributory negligence of the plaintiff: *Chisholm* v. *London Passenger Transport Board.* (2) The problem which arises in the present case has not been judicially decided. The passenger crossing here is at a road intersection, where traffic is for the time being controlled by light signals, and, in such a case, by reg. 5 of the Pedestrian Crossing Places Regulations, 1935, the driver must allow free and uninterrupted passage to every foot passenger who has started to go over the crossing, before the driver receives a signal that he may proceed over the crossing.

Now, on the facts of this case, when the plaintiff started from the west side of Artillery Row and crossed to the refuge, the defendant had not received a signal that she might proceed over the crossing. The lights thereafter changed and she received her signal to proceed before the plaintiff reached the refuge; at the time when he started to traverse the crossing on the other side of Victoria Street, the defendant, waiting in Buckingham Gate in her car for the change of light signal, was thus under an obligation to give to the plaintiff free and uninterrupted passage. The plaintiff relies also on reg. 3, which provides that the driver of every vehicle approaching a crossing, whether controlled or not, shall "unless he can see "there is no foot passenger thereon, proceed at such a speed

(1) [1938] 1 K. B. 156, 166.

(2) [1939] 1 K. B. 426.

"as to be able, if necessary, to stop before reaching such "crossing."

The defendant admits that she did see the plaintiff on the refuge. It is apparent from the decision in *Bailey* v. *Geddes* (2) that, quite apart from any consideration of light signals, the obligation imposed on drivers by reg. 3 applies to all pedestrian crossings controlled or not controlled, and had the plaintiff been well on the crossing before he was knocked down no plea of contributory negligence could have been sustained, but it is said on behalf of the defendant that this is a case resembling *Chisholm* v. *London Passenger Transport Board* (1), in that the pedestrian suddenly and carelessly stepped on to the crossing from the refuge, a place of safety, which therefore must be regarded as was the pavement in that case.

The problem, which is not an easy one, resolves itself into this. If the crossing be regarded as one continuous crossing within the regulations and the presence of the refuge is to be ignored, the case is clearly within the principle of *Bailey* v. *Geddes* (2), both under reg. 5, in that the defendant before she received a signal that she might proceed over the crossing failed to give free and uninterrupted passage to the plaintiff, and under reg. 3, in that being unable to say that she could see that there was no foot passenger thereon, in approaching the crossing she did not proceed at such a speed as to be able if necessary to stop before reaching the crossing. If, however, the presence of the refuge is to be regarded as causing some modification in the application of the regulations to the crossing, other considerations may arise.

But by the respondent it is said that there are here two crossings within the meaning of the regulations; the one from the east side of Artillery Row to the refuge, the other from the refuge to the west side of Artillery Row, or alternatively, that, if the proper view be that this is one crossing, then there is in the middle of that crossing a zone of safety to which the regulations cannot be said to apply, and, therefore, when it is said that free and uninterrupted passage is to be given to every foot passenger who starts to go from the crossing, that

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must be understood to mean starts to go into the area of danger which might otherwise be interrupted and ceases when the area of safety is reached and he becomes a refugee, and that an entirely fresh obligation on the driver begins when the pedestrian starts from the other side of the refuge to complete the transit. This latter view would not, on the assumption that there is one crossing, appear to me to protect the defendant against the provisions of reg. 3. That regulation speaks merely of a foot passenger on the crossing and does not distinguish between the first and the second part of it, and takes no account of the refuge.

There remains the question, however, whether there was here one crossing or two. A "crossing" is defined by reg. 2, unless the context otherwise requires, as a "crossing place "for foot passengers indicated by a traffic sign prescribed for "the purpose by regulations made by the Minister."

In my view, the learned judge was mistaken in coming to the view that there was anything in *Chisholm's* case (1) to compel the Court to decide that this was one crossing. True it is that in that case Scott L.J., although there was a refuge, speaks of the whole area to be crossed as the "crossing," but the question here raised was never before the Court nor material to their decision, and I regard the matter as res integra. The definition of "crossing" in reg. 2 of the Pedestrian Crossing Places Order assumes at the outset that a crossing, within the contemplation of that Order, means a crossing place for passengers, and goes on to define the type of crossing places covered by the Order, but the phrase "crossing place for foot passengers" makes it clear, to my mind, that the definition is dealing with an area where such passengers may expect to encounter in their crossing peril from traffic other than that of foot passengers, and that it is the carriage way which foot passengers may desire to cross which is the subject-matter of the definition. Such an implication, derived from the word "crossing," is found in terms in reg. 4, which speaks of a free and uninterrupted passage to any foot passenger who is on the "carriage way" at such crossing,

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and the same clause goes on to speak to the same effect when it provides that "every such foot passenger shall have "precedence over all vehicular traffic at such crossing." Reg. 5, which we have here particularly to consider, though it does not use the words "carriage way," speaks of a vehicle "at "or approaching a crossing" at a road intersection, and uses the phrase "crossing," I think, in the same sense.

For these reasons, apart from a general consideration of the mischief to which the regulations are directed, it is apparent, in my view, that a refuge, where a foot passenger by its nature cannot possibly be in any reasonable peril of encountering vehicular traffic is not part of a crossing, albeit one or more of the crossings on each side of the refuge are indicated by a traffic sign as in the definition clause provided. There is nothing, therefore, in the regulations to prevent the conclusion that there are here to be considered two crossings. The definition in reg. 2 speaks of a crossing place for foot passengers indicated by a traffic sign, using the singular. The traffic signs in the present case consisted of studs, which, according to the evidence, were arranged, as required by statutory directions, to show by their distances apart one from the other which way the stream of traffic was expected to proceed, according to whether it was going north or south in Artillery Row on one side or other of the refuge, and, in so far as the traffic signs are any indication, there were required and provided different series of traffic signs on one side of the refuge to the other. Under the Traffic Signs (Pedestrian Crossings) No. 2 Provisional Regulations, 1934, where light signals are installed for the regulation of traffic, and the directions given under s. 48 of the Road Traffic Act, 1930, a band of metal on the carriage way must indicate the line beyond which vehicular traffic must not proceed when signalled to stop at traffic signals. There is consequently provided in the area between the pavement on the west side of Artillery Row, where there is a traffic light, and the refuge, a metal band across the road, but no such band is provided across the eastern half of Artillery Row from the refuge to the eastern pavement, where there is no such traffic light. Thus, so far as the physical treatment by traffic signs is concerned, it would point to two crossings and not one. It is significant to observe that the definition speaks of a traffic sign in the singular, as I have already pointed out, indicating, as I think, one system of traffic signs for each crossing.

But I arrive at my conclusion that this ought properly to be regarded as two crossings, apart altogether from the actual nature of the traffic sign and studs laid down, as prescribed, from a consideration of the nature of the regulations themselves. All the regulations under the Pedestrian Crossings Regulations here to be considered seem to me to contemplate an area where the safety of the pedestrian is sought to be established, and areas not so in need of protection are not statutory crossings. Thus, reg. 3 speaks of the foot passengers thereon and requires the driver of the vehicle in appropriate circumstances to proceed at such a speed as to be able, if necessary, to stop before reaching such crossing. Such a regulation cannot, I think, be applied properly to a place of safety such as the refuge where the question whether the driver should stop or not can scarcely arise unless he is preparing to drive over the refuge. Reg. 4 says, in the case of traffic not controlled by constables or light signals, every foot passenger on the carriage way at such crossing shall be allowed free and uninterrupted passage and have precedence over all vehicular traffic at such crossing. It is difficult to conceive the circumstances in which a foot passenger would be in need of claiming precedence over vehicular traffic while he was on the refuge which, on the argument of the plaintiff, must be regarded as part of the crossing. Similar considerations arise as to the free and uninterrupted passage to the foot passenger who has started to go over the crossing when applied in reg. 5 to a refuge and on reg. 6, which says that no driver shall cause a vehicle to stop upon a crossing in certain circumstances, a provision entirely inappropriate to the refuge.

I do not think that this last regulation could properly be construed to refer to the refuge; for it has reference to the prevention of obstruction of vehicular traffic by pedestrians on the crossing as such. So also reg. 7, which provides that no foot passenger shall remain upon a crossing longer than is necessary for the purpose of passing from one side of the road to another with reasonable dispatch. If a passenger were to pause on the refuge to light a pipe, I do not think he would offend against reg. 7.

Similarly, when s. 18 of the statute, under which these regulations are made, is considered, it authorizes them to be made "generally with respect to the movement of traffic "(including foot passengers) at and in the vicinity of a "crossing," and does not appear to deal with an area of safety, in which the pedestrian requires no protection from the movement of traffic. A further reason may be found for this view in the Metropolis Management Act, 1855, whereby it was made lawful for local authorities to place erections in carriage ways so as to make the crossing thereof less dangerous to foot passengers, and there is a corresponding provision in s. 39 of the Public Health Acts Amendment Act, 1890, whereby authorities may place in any street, being a highway, places of refuge for the purpose of protecting passengers and traffic, either along the street or on the footways from injury, danger or annoyance, or for the purpose of making the crossing of any street less dangerous to passengers. See also the Local Goverment Act, 1929, Sch. 1, and the Road Traffic Act, 1930, s. 55. For a considerable time, it is apparent, the Legislature has regarded a refuge as a place of safety from vehicular traffic for passengers on crossings. In my view, therefore, the regulations made under the Road Traffic Act, which we have here to consider, are dealing not with the area of the refuge but with the crossing as such, which in the ordinary course of events will be traversed both by pedestrians and vehicles to the peril of the former, unlike the refuge, which is by its nature for the use of pedestrians alone.

Thus, having come to the conclusion that there were here two separate crossings interrupted by a refuge, it follows that the defendant properly can plead the contributory negligence of the plaintiff as a defence. The learned judge says that once he steps off an island, he is stepping from something which is not part of the crossing on to something which is, I agree, though for different reasons, and applying

Chisholm's case (1), it follows that the appellant is capable of contributory negligence if he steps on to the second crossing in such a way that traffic travelling at a reasonable speed cannot stop in time to avoid hitting him, and the driver cannot be said to have an opportunity to give precedence to the foot passenger. This the plaintiff did in the present case.

In my view, therefore, while I disagree with the learned judge's conclusion that there was here only one crossing, I agree that the refuge should not properly be regarded as part of the crossing for the purpose of these regulations as applied to the facts of this case, and am of opinion that by reason of his own negligence the plaintiff fails and this appeal should be dismissed.

SCOTT L.J. I agree. It seems to me wholly impossible to suppose that the Minister in drafting "the Pedestrian "Crossing Places (Traffic) Provisional Regulations, 1935, "pursuant to s. 18, sub-s. 2, of the Road Traffic Act, 1934," should have intended to ignore the wide-spread and long established usage of erecting in busy thoroughfares so-called "places of refuge" for pedestrians, where they can safely pause between the streams of vehicular traffic. That public practice has been long followed by local authorities in the United Kingdom, and although the danger to pedestrians was infinitely less in degree before the days of motors, it was the same in kind. The pedestrian had to face then as now a double danger; as he started to cross a road, he had to face the risk of collision with the stream of traffic approaching from his right and flowing across his path at right angles; and he had mid-way in his transit to face the reverse stream coming from his left; and for each half of the stream to look in a different direction: and the mid-way point of his transit, where the opposing tides bordered on each other, was obviously the zone of maximum danger. Hence "the place of refuge" in the middle of the road. That usage dates back for nearly a century. When the "Principal" Pedestrian Crossing Regulations were drafted,

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the practice of pedestrians pausing on the refuge, in order to avoid danger before resuming their passage across the road, was notorious. The interpretation the appellant would put upon No. 5 of the 1935 Regulations disregards the whole of that long standing social system of our road traffic. Unless the wording is so clear and unambiguous as to compel a construction which would ignore the existence and use of refuges, I am not prepared to accept it; and if I were so compelled, I should doubt the validity of the regulation; as my present inclination is to think that it would not be intra vires s. 18.

The question of ultra vires, however, does not in my view arise, and I express no final opinion upon it; but the language of s. 18, and indeed of the two Road Traffic Acts, may properly be prayed in aid not only on the issue of ultra vires but for the purpose of construing the language of the regulations where it is ambiguous; and for that purpose I think the language of s. 18 throws some light. The Act of 1934, s. 42, sub-s. 1, provides that that Act is to be construed as one with (inter alia) the Act of 1930. Sect. 48 of the earlier Act, by sub-ss. 1 and 2 provides for "traffic signs"; and sub-s. 9 provides that that expression shall include "all . . . . devices for the guidance "or direction of persons using roads." Sect. 55 gives power to urban local authorities (in the present case the City of Westminster) "for the purpose . . . . of making the crossing "of any road less dangerous to foot passengers," to "erect . . . . "places of refuge in the road." In this provision the word "crossing" means the act of crossing. Sect. 18 of the 1934 Act provides by sub-s. 1 for the establishment of crossings for foot passengers; and by sub-s. 2 for regulations by the Minister in these terms: "The Minister may make regulations with "respect to the precedence of vehicles and foot passengers "respectively, and generally with respect to the movement "of traffic (including foot passengers) at and in the vicinity "of a crossing (including regulations prohibiting foot passenger "traffic on the carriage way within one hundred yards of a "crossing), and with respect to the indication of the limits of a "crossing by marks on the roadway or otherwise, and to the

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"erection of traffic signs in connection therewith." A "crossing" in these sub-sections means the place where a pedestrian may cross. Sub-s. 3 is as follows: "Different regulations "may be made under this section in relation to different traffic "conditions and, in particular, but without prejudice to the "generality of the foregoing words, different regulations may "be made in relation to crossings in the vicinity of, and at a "distance from, a junction of roads, and to traffic which is "controlled by the police, and by traffic signals, and by "different kinds of traffic signals, and which is not controlled." The last sub-section should, in relation to traffic controlled by light signals, be construed in the light of s. 49 of the 1930 Act, which, as amended by the 1934 Act, now reads as follows: "Where a police constable is for the time being engaged in the "regulation of traffic in a road, or where any traffic sign being a "sign for regulating the movement of traffic or indicating the "route to be followed by traffic (and being of the prescribed size, "colour, and type, or of another character authorised by the "Minister, has been lawfully placed on or near any road, any "person driving or propelling any vehicle who—(*a*) neglects or "refuses to stop the vehicle or to make it proceed in or keep to a "particular line of traffic when directed so to do by the police "constable in the execution of his duty; or (*b*) fails to conform to "the indication given by the sign, shall be guilty of an offence." Under that section it is the duty of traffic to obey the orders of a controlling police constable and "to conform to the "indication given by the sign," for example, traffic lights. If I may disregard the amber, it imposes on motor traffic at a light controlled road intersection a duty to stop when the light turns red, but to go on when the light turns green; and in my opinion the interpretation of the sections and regulations relating to pedestrian traffic at pedestrian crossings must have due regard to those duties of the vehicular traffic. The object of s. 49 is plainly to promote the steady and regular flow of such traffic, by preventing unnecessary delay in forward movement at controlled cross roads where one stream has ex hypothesi to be stopped to allow the cross-stream to flow, and each flow is therefore necessarily intermittent. These considerations have, in my view, a direct bearing on the statutory function of refuges for pedestrians.

The stress of the appellant's argument was very properly laid upon the contrast between the language of reg. 4 and that of reg. 5, and particularly upon the omission from reg. 5 of the words "on the carriage way." I agree that this is the cardinal difficulty of construction; and it is, in my view, the only serious obstacle to the only interpretation of the regulation which accords with common sense, with justice, and with our old established road system of refuges for the protection of pedestrians. In the U.S.A. refuges are called "zones of safety." Legislation there is not the same as ours; but it is well recognized that it is negligence of a pedestrian carelessly to step off a refuge into the road and so to expose both vehicular traffic and himself to danger: see as an illustration of this common sense view *Schroeder et al.* v. *Pittsburgh Railways Co.* (1) The fundamental purpose of our "refuges" also is to serve as "zones "of safety." Having regard to the express provision of s. 55 of the Act of 1930 in regard to "places of refuge in the road," I find it impossible to suppose that the sections of the two Acts (which are to be read as one), and the regulations thereunder, about pedestrians crossing the road, are to be construed either as if there were no refuges in the roads, or on the footing that their presence there should be disregarded in considering the mutual duties of vehicles and pedestrians. The very fact that for nearly a century, pursuant to general legislation, refuges have been placed at the dividing line between the two opposing streams of vehicular traffic—the point of most danger to a pedestrian crossing a road—seems to me conclusive that the statutory intention of the regulations is to enable a pedestrian, who has successfully passed through the one stream of traffic, to pause in safety and turn his head in the direction from which the other stream is coming—both for his own sake and for the sake of the vehicular traffic; and I cannot conceive the possibility of so construing reg. 5 as to relieve the pedestrian of that duty of attention and care, unless the meaning of it be so explicit as to compel that construction. So far is this from

(1) (1933) 311 Penn. S. R. 398.

being the case, that I think the express reference to refuges in regs. 2 and 3 and in the Schedule of the Traffic Signs (Pedestrian Crossings) Provisional Regulations, 1934, in conjunction with which the Pedestrian Crossing Regulations, 1935, obviously have to be read, points exactly the other way, and makes it necessary to read reg. 5 equally with reg. 4 as impliedly subject to qualification when there is a refuge in the road. For the purpose of such a construction, one of two solutions must be adopted; either that of Slesser L.J. (with which *Chisholm's* case (1) is in no way inconsistent), that there are two "crossings," one on each side of the refuge; or, if as a matter of interpretation there is only one "crossing" between the one side of the road and the other, then the alternative solution, that there is mid-way in the crossing over the road an area which is no more part of "the crossing" than it is of the "carriage way" on each side of it. In this interpretation the pedestrian on the refuge temporarily loses his right to walk on regardless of approaching traffic; he comes under a duty momentarily to give way, and wait there till he can step on to the further half of the road without causing difficulty or serious inconvenience to oncoming traffic, as this Court said in *Chisholm's* case (1) in regard to the comparable case of leaving the pavement. In the result, I cannot regard the omission from reg. 5 of the words contained in reg. 4 "on the carriage "way" as a sufficient reason for adopting an interpretation which would exonerate the pedestrian from all duty of care when on or leaving the refuge.

This is the only interpretation of reg. 5 which seems to me consistent, not only with the legal duty of care, but also with that social or moral duty of courtesy of the pedestrian to the motor. Safety to-day depends much on the mutual courtesy and considerateness of all road users; and to exempt the pedestrian from his legal duty in the way contended by the appellant would be a direct encouragement to conduct the very opposite of courtesy and consideration.

I think that the judgment of Asquith J. was right, and that the appeal should be dismissed.

(1) [1939] 1 K. B. 426.

GODDARD L.J. As both my Lords are of opinion that this judgment should be upheld, I think that I ought to resolve the doubts that I have felt in favour of the defendant, and need only add a few words. As I understand *Bailey* v. *Geddes* (1), which is binding on this Court, though open to review elsewhere, if the driver of a vehicle is proved to have committed a breach of these regulations, it is not open to him to set up the defence of contributory negligence, because the pedestrian has a right to assume that the vehicle will not be on the crossing and that he has the undisputed right of way. *Chisholm* v. *London Passenger Transport Board* (2) in no way impugned that decision, but it was held in the particular circumstances of that case that the driver had not committed a breach of regs. 3 or 4, and could therefore rely on the negligence of the plaintiff as a defence. In the present case the lights were in favour of the plaintiff when he left the pavement on the west side, but were against him and in the defendant's favour when he reached and indeed before he reached the refuge. In my opinion, therefore, the sole question is whether the mouth of Artillery Row is to be regarded as one single crossing or as two, that is to say, is the space between either side of the refuge and the pavement to be considered as a separate crossing? If, as the learned judge held, it is to be regarded as one entire crossing, I see no escape from the conclusion that the plaintiff had started to go over the crossing before the lights turned in the defendant's favour and was thus entitled to the full right of way. But for the reasons given by my Lords, I think this would result in what would be really an unworkable state of affairs, and that consequently we ought to hold that the presence of a refuge does turn what would otherwise be one single crossing into two. On this view, the case is exactly covered by *Chisholm* v. *London Passenger Transport Board* (2) and the plaintiff must fail. He started from the refuge when the defendant had the right of way, and the latter had no opportunity of avoiding him. It is, I venture to think, unfortunate that these regulations do not deal in any way with the presence or absence of refuges at these crossings, and I am left

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(1) [1938] 1 K. B. 156.

(2) [1939] 1 K. B. 426.

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in complete doubt as to whether the omission is due to accident or design. When one remembers that not only in London but in many provincial towns there are large numbers of light controlled crossings, some with refuges upon them and some without, I hope that this case will not escape the notice of the Minister of Transport, so that some further or amended regulations may be issued clarifying the position. They have to be observed every hour of the day by the man in the street, using that expression in the most literal sense, and there ought to be no doubt as to the respective obligations and privileges that they impose or confer on drivers and pedestrians.

It will be observed that this Court is upholding the judgment for reasons not altogether identical with those on which the learned judge based his decision. I call attention, also, to the difference between reg. 4, dealing with uncontrolled crossings, and reg. 5, dealing with those controlled. In the one case, the right of way is given to persons on the carriage way, in the other to persons who have started to go over the crossing. If these two expressions mean the same thing, I see no reason for the difference in the language used. If they do not, the public have a right to be told in clear language what the differentiation in language is intended to effect.

I may perhaps also be allowed to add that this case seems to show in a striking manner how desirable would be an alteration in the law enabling Common Law Courts to apply the Admiralty rule as to apportionment of damage to collisions on land, as was recommended by the Law Revision Committee in their last report. Here the judge has found, as I read his judgment, that each party contributed to the accident in about equal degrees ; the plaintiff suffered grievous injury and the defendant none. Yet the whole loss falls on the plaintiff. It would have been equally hard had the defendant been obliged to bear it all, whereas if the Admiralty rule could be applied, the damage would have been shared and the defendant would thus have recovered half the loss.

SCOTT L.J. I would like to say that I am in complete concurrence with Goddard L.J.'s view as to the desirability of a change in the law, making applicable the Admiralty rule.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for appellant: *Pothecary & Barrett.*
Solicitors for respondent: *Stanley & Co.*

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May 8, 9.

MILLS *v.* STANWAY COACHES, LIMITED AND ANOTHER.

[1939. M. No. 1968.]

Damages—Measure of—Motor accident—Negligence causing death—Pain and suffering—Loss of expectation of life—Action by administrator—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93)—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1.

The plaintiff, whose wife had died in consequence of injuries sustained by her in a collision between two motor vehicles through the negligence of the defendants, brought an action against the defendants claiming (inter alia) under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrator of the estate of the deceased, damages for her loss of expectation of life and for her pain and suffering.

As to the expectation of life of the deceased, it appeared that at the time of her death she was thirty-four years of age, that she had been a healthy woman who had never had an illness, that she had four children of her marriage, that her prospect of life according to actuarial tables was another thirty-four years, and that her social position was that her husband, the plaintiff, was a provision shop manager.

As to her pain and suffering, the medical and other evidence showed that her injuries consisted in fracture of the skull, of two ribs, and of the pelvis, and severe bruising of the chest and ankles; that she survived in hospital for four days after the accident, that after admission to hospital she suffered for a time from intense irritation which made it difficult to examine her nervous system, that next day she was quieter and would answer to her name, that her condition improved a little until the third day when she became more restless, resenting interference, that eventually her respiration became feeble and she collapsed and died, and that the degree of pain which she suffered was extremely difficult to estimate owing to her marked restlessness which was probably due to cerebral irritation rather than to actual pain:—

Held, by the Court of Appeal, reducing both the respective sums which had been allowed as damages by the trial judge, that the plaintiff should recover 1000*l.* in respect of the loss of expectation of life of the deceased, and 50*l.* in respect of her pain and suffering.

Observations on the principles to be applied, and the weight to be given to previous cases, in assessing damages for the loss of expectation of life and the pain and suffering of a person who has died in consequence of an accident.

APPEAL from the judgment of Greaves-Lord J.

On May 3, 1939, about 10.45 P.M., a motor-coach belonging to Stanway Coaches, Ld. (hereinafter called "the first "defendants"), and driven by their driver, was passing along the Highway, Stepney, from west to east, and a motor-car owned and driven by Mr. Joseph Martin (hereinafter called " the second defendant "), was passing along Glamis Road, Stepney, from south to north, when a collision took place between the vehicles at the junction of these two roads, the front of the coach striking the near side of the car.

As a result of the collision Mrs. Milly Mills (hereinafter called " the deceased "), the wife of Mr. Ernest Mills, who was sitting in the back seat of the car on the near side, was seriously injured, and was taken to the London Hospital, Whitechapel Road.

On May 8, 1939, at 12.30 A.M., she died there from her injuries.

On the same date, at Mile End Hospital, a post-mortem examination was made of the body of the deceased, from which it appeared that her injuries included fracture of the skull, severe bruising of the back of the chest with fracture of two ribs, fracture of pelvis, and bruising of ankles.

On June 22, 1939, Mr. Ernest Mills, hereinafter called "the plaintiff," brought the present action against the first defendants and the second defendant, alleging that he as the husband and administrator of the estate of the deceased brought the action under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, on his own behalf and for the benefit of the estate of the deceased, they having suffered damage from the negligence of the first defendants, their servant or agent in the management and control of the said motor-coach, their property, and/or owing to the negligence of the second defendant in the management and control of the said motor-car, his property, whereby the said collision took place between the vehicles, causing the deceased to suffer injuries from which she died ; that these injuries were caused by particular acts of negligence there specified of the first defendants, or in the alternative of the second defendant, or in the further alternative of both defendants jointly ; and that the plaintiff claimed—(*a*) damages under the Fatal Accidents Acts ; (*b*) damages under the Law Reform (Miscellaneous Provisions) Act, 1934, for the pain and suffering of the deceased from the time of the accident until her death, and for the shortening of her life; and (c) funeral expenses. (1)

The defendants delivered defences in which they respectively denied the alleged negligence and damage, and each alleged that the death of the deceased was caused solely by the negligence of the other defendant.

On January 6, 1940, the action was tried by Greaves-Lord J. without a jury, when evidence was given on behalf of each of the parties on the several issues raised.

The evidence, so far as it related to the deceased's loss of expectation of life, went to show that at the time of her death she was thirty-four years of age, that she was a healthy woman who had never had an illness, that she had four children of her marriage, that her prospect of life according to actuarial tables was another thirty-four years, and that her social position was that her husband, the plaintiff, was a provision shop manager.

As to the pain and suffering of the deceased, it appeared from the medical report of Dr. M. D. Young, house surgeon at the London Hospital, that on admission to the hospital she was suffering from intense irritation, throwing herself about the bed and making no response to questions, but repeatedly demanding to get up; that it was very difficult to examine her nervous system on account of her marked restlessness; that on the day following she was much quieter and would answer to her name; that her condition improved a little until May 7, when she became much more restless, resenting interference; that very early on the following morning, May 8, her respiration suddenly became feeble, and she collapsed and died; that she had been kept as quiet as possible by sedatives; and that the degree of pain which she suffered was extremely difficult to estimate owing to her very marked restlessness, which was probably due to cerebral irritation rather than to actual pain. The evidence of the plaintiff in regard to his wife's condition in hospital is summarized below in the judgment of Slesser L.J.

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(1) This report is confined to head (b) of the above heads of claim.

Greaves-Lord J. found, on the evidence, that the first defendants, by their driver, had been negligent, but that the second defendant had not been negligent, and that the accident had been caused by the negligence of the first defendants' driver; and he gave judgment against the first defendants for 2000*l.* in respect of loss of expectation of life of the deceased; 200*l.* in respect of her pain and suffering during the four days between the accident and her death, and 28*l.* 10*s.* for funeral expenses—making in all 2228*l.* 10*s.*

The first defendants appealed. The appeal was heard on May 8, 9, 1940.

J. W. Morris K.C. and *S. R. Edgedale* for the first defendants, appellants. The evidence shows that the collision between the two vehicles was caused by the negligence not only of the first defendants, but also of the second defendant, Martin, and, that being so, they are jointly liable, and the damages should be divided between them in equal shares. The sum of 2000*l.* awarded by the learned judge to the plaintiff as damages for the deceased's loss of expectation of life, and of 200*l.* for her pain and suffering are excessive. He did not assess these damages in accordance with the principles laid down in *Rose* v. *Ford* (1), and *Flint* v. *Lovell* (2), and in view on the one hand of the circumstances of the present case, and on the other hand of the circumstances of these two cases and other cases such as *The Aizkarai Mendi* (3); *Shepherd* v. *Hunter* (4); *Bailey* v. *Howard* (5); and *Gambling* v. *Benham* (6); the amount of the damages in the present case should be substantially reduced.

Fox-Andrews and *F. W. Wallace* for the second defendant, respondent. It appears by the evidence, and the learned judge has found as a fact, that the collision and resulting damage were caused by the negligence of the first defendants only, and not by any negligence on the part of the second defendant, and consequently the first defendants are alone liable for the assessed damages. If the second defendant was guilty of any negligence contributing to the accident, then, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 2, the liability should be apportioned between the defendants, and the share of the second defendant should not exceed ten per cent. of the whole.

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(1) [1936] 1 K. B. 90; [1937] A. C. 826.

(2) [1935] 1 K. B. 354.

(3) [1938] P. 263.

(4) (1938) 82 Sol. J. 375.

(5) [1939] 1 K. B. 453.

(6) [1940] 1 All E. R. 275.

J. P. Eddy K.C. and *F. G. Paterson* for the plaintiff, respondent. As to the persons liable for damage caused by the accident, the plaintiff has pleaded that the first defendants and the second defendant are both severally and jointly liable, and it is not very material to him whether either or both of them are held liable, so long as he recovers the damages which he claims. The sum to be allowed for the loss of expectation of life of the deceased should be left to the good sense of the Court of trial. In each case the relevant facts must be taken into account, such as the age, the state of health, the social standing and the occupation of the deceased. In *Rose* v. *Ford* (1), and *Bailey* v. *Howard* (2), the sum of 1000*l.* was allowed, but these cases were decided before the present war, and if they had been decided since the war that sum might not have been thought sufficient. Different amounts have been allowed in other cases, and there is such an absence of consistency and uniformity in the cases that no principle of assessment can be inferred from them. This Court should not interfere with the assessment made by the trial Court, unless that assessment is entirely wrong, as in the case of *Ellis* v. *Raine* (3), where the trial Court allowed nothing for loss of expectation of life. In the present case, the sum of 2000*l.* was not excessive. Similarly, the assessment of the sum to be allowed for the pain and suffering of the deceased in cases of this kind ought in general to be left to the trial Court in the particular case. The amount allowed in one case provides no standard for the amount in another case. In the circumstances of the present case, the sum of 200*l.* allowed by the judge was not excessive.

SLESSER L.J. This is an appeal by the defendants, Stanway

(1) [1936] 1 K. B. 90; [1937] A. C. 826.

(2) [1939] 1 K. B. 453.

(3) [1939] 2 K. B. 180.

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Coaches, Ld., from the judgment of Greaves-Lord J., without a jury. It is a case where the plaintiff, Ernest Mills, sues primarily as the administrator of the estate of Milly Mills, deceased, who was his wife. The learned judge has come to the conclusion that this lady, who was travelling as a passenger in a car which was being driven by one Joseph Martin, one of the defendants, was killed through the negligence of the driver of the car of the other defendants, Stanway Coaches, Ld. He has acquitted Martin of negligence and has given damages against Stanway Coaches, Ld., in respect of loss of expectation of life of Milly Mills, 2000*l.*; in respect of pain and suffering incurred by her for the four days between the accident and her death, during which time she was, nearly all the time, in a state of unconsciousness in hospital, 200*l.*; and there is a small sum of 28*l.* 10*s.* under the Fatal Accidents Acts in respect of funeral expenses which, by the provision of the Law Reform (Miscellaneous Provisions) Act, 1934, may now be regarded as vested in the estate so as to enable the administrator to claim for it. There is no contest with regard to this small sum.

It is said in the first place as against the plaintiff that the learned judge was wrong in awarding the sums of 2000*l.* for loss of expectation of life and 200*l.* for pain and suffering incurred by the deceased now vested in the estate as I have said, in that, to quote the well known language of Greer L.J. in *Flint* v. *Lovell* (1): "The amount awarded was so extremely "high . . . . as to make it, in the judgment of this Court, an "entirely erroneous estimate of the damage to which the "plaintiff is entitled."

It is convenient to deal first with the larger sum of 2000*l.* which has been awarded for loss of expectation of life of Milly Mills. On that two matters have to be determined. First, whether the sum is so excessive an amount that this Court will say that the learned judge was wrong in awarding it, and, secondly, if the Court be of opinion that he was so mistaken, what sum ought properly to be assessed in its place.

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(1) [1935] 1 K. B. 354, 360.

Two questions must be borne in mind: first, is it a case where the Court ought to interfere with the discretion of the judge, who, sitting without a jury, if he assesses the damages without offending against any principle, or without giving damages so excessively high or so excessively low that this Court ought properly to interfere, must be the arbiter of the amount of the damages? This Court will not interfere merely because this Court or any member of it would be inclined to give a different figure. That has been often stated, but I mention it as introducing what I think are the considerations which should move the Court in applying the principle to this case. The other question is how far the fact that this Court in dealing with cases, similar in so far as they are material to the assessment of damages, has from time to time approved or disapproved particular sums which should be used as a guidance to this Court in determining whether the particular damages awarded should or should not be disturbed. In my view such cases may be a guidance but are not a mechanical guidance. That is to say, the fact that this Court has allowed in a particular case a certain sum to be varied and some other sum to be assessed is of some assistance to this Court, but is not to be taken as a rigid determination or limit of the amount of damages which ought to be awarded. Were this Court to apply as a rigid principle that what it has once given in similar circumstances should be given again, it would invade the province of the judge whose function to award damages is such that it will not be invaded merely because this Court would give a different sum. On the other hand, as I say, it is some criterion and in some cases may be of material assistance.

In the present case the plaintiff, as administrator of the estate of the deceased, who was his wife, has been awarded the sum of 2000*l.* in respect of her loss of expectation of life. The deceased was a woman thirty-four years of age, who had never had an illness in her life, and she had four children. The learned judge tells us that her expectation of life in those circumstances, according to actuarial estimates as embodied in the expectation of life tables, would be another thirty-four years, and he said he would assume that she was now at the happiest part of her life. Her situation is that of a person of respectable class, not overburdened with riches and not overpressed by poverty, her husband being a provision shop manager. She belonged to what used to be called, I suppose, the lower middle class. That was her position and there is little more that can be said about her.

It has been held by Langton J. in *The Aizkarai Mendi* (1), that in any question of expectation of life the age factor cannot be entirely negligible, and (2) "if one assumes that the "pleasure in existence derived by two men of different ages "is equal, it appears to me to follow that, if both are in the "same state of health and are following the same calling with "the same kind of risk, the expectation of life of the younger "man must exceed that of his elder." This Court approved, I think, that approach to the matter in *Gambling* v. *Benham* (3), at any rate, by a majority. That being so, one has regard to the fact, as a mere assistance of one's ultimate judgment and not as a mechanical conclusion, that in *Rose* v. *Ford* (4) this Court, dealing with a woman younger than the woman deceased in the present case, was called upon itself to assess the damages. The reason was that in that case Humphreys J. in the Court below had thought the decision in *Flint* v. *Lovell* (5), which was the earliest case that had immediately raised this question, did deal with the loss of expectation of life as a part of mental suffering of the deceased. In the report of that case it is stated (6) that "He (the judge) rejected "the third ground of claim for damage for loss of a reasonable "expectation of life, because there was no evidence at all of "any mental suffering being caused to the girl by reason "of the shortening of her expectation of life which he "thought was the basis of the decision in *Flint* v. "*Lovell*." (5) This Court took the view that he was wrong, and that *Flint* v. *Lovell* (5) had decided that quite apart from pain and suffering the person whose life had been shortened

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(1) [1938] P. 263.
(2) Ibid. 277.
(3) [1940] 1 All E. R. 275.
(4) [1936] 1 K. B. 90; [1937] A. C. 826.
(5) [1935] 1 K. B. 354.
(6) [1936] 1 K. B. 90, 92.

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in expectation while living, as in *Flint* v. *Lovell* (1), or now by operation of statute, the administrator of the estate of such a person when deceased might claim damages for that matter as an independent head of damage. Consequently, in *Rose* v. *Ford* (2) this Court, whose decision the House of Lords approved and held that *Flint* v. *Lovell* (1) was itself good law, had to assess the damages and an award was made by this Court of 1000*l*. Greer L.J. (3) quotes from what had been said by Parke B. in *Armsworth* v. *S. E. Ry. Co.* (4) to the effect that " Scarcely any sum could compensate a "labouring man for the loss of a limb, yet you don't in such "a case give him enough to maintain him for life" ; and Brett J. in *Rowley* v. *L. & N. W. Ry. Co.* (5) said (6) that the invariable direction to juries had been " that they must not "attempt to give damages to the full amount of a perfect "compensation for the pecuniary injury, but must take a "reasonable view of the case, and give what they consider, "under all the circumstances, a fair compensation." As I say, that was the sum there decided to be awarded. In *Rose* v. *Ford* (2) Mabel A. Rose, who was killed by reason of a motor-car having collided with her, was a younger woman than Milly Mills, the woman in this case. She is described in the report as a girl, and I think she was some twenty-three years of age. Other things being equal, applying the principle of the *Aizkarai Mendi* case (7), it would appear that her expectation of life, the reasonable duration of which is a factor to be considered, would be greater than that of the woman in this case, who was aged thirty-four. This woman, it is true, had four children. Whether, therefore, she enjoyed life the more or the less I am unable to determine, and I do not seek to enquire. But this fact emerges, as I say, that in the present case the learned judge has given not slightly more or slightly less than the 1000*l*. which was considered by this Court to be a fair assessment for that also perfectly healthy woman aged

(1) [1935] 1 K. B. 354.

(2) [1936] 1 K. B. 90; [1937] A. C. 826.

(3) Ibid. 102.

(4) (1847) 11 Jurist, 758, 760.

(5) (1873) L. R. 8 Ex. 221.

(6) Ibid. 231.

(7) [1938] P. 263.

twenty-three, but that he has thought fit to give double that sum.

Taking all these matters into consideration, I think it is difficult to say when this Court has stated the damages for loss of expectation of life for a healthy woman of twenty-three to be 1000*l.*, that to double that sum in the case of a healthy woman of thirty-four, is not an entirely erroneous estimate of damage by reason of its excess. Had the sum been above 1000*l.*, in the neighbourhood, perhaps, of 1200*l.* or 1300*l.*, or if it had been less, I think this Court would not have interfered; but I do think that to double the sum which this Court thinks a fit assessment for the loss of expectation of life of a woman of twenty-three when we are dealing here with a woman of thirty-four does constitute an erroneous estimate such as calls for intervention. I do not say that this sum of 1000*l.* which was awarded is in any way to be regarded as a fixed limit, because one must always bear in mind that the circumstances in every case differ in some particulars from those in other cases. But as Scott L.J. said in the case of *Bailey* v. *Howard* (1): " Whether ultimately any sort of scale will "be worked out, or whether the assessment will remain "permanently quite empirical, one cannot say." Previously he had spoken of the " gradual working out, chiefly through the "common sense of juries "—and, as I say, where there is no jury, of judges—" of the sort of figures that in English "civilization of to-day are to be regarded as reasonable for "damages under that particular head." I venture to express the hope that learned judges, and juries, in dealing with this matter will not overlook the fact, among other facts, that this Court has itself assessed the sum of 1000*l.* as a reasonable and proper sum for loss of expectation of life of a woman aged twenty-three in a healthy condition of life, without illness and without misfortune. It is an indication, therefore, of what this Court thinks to be the sort of sum which is appropriate in such a case, at any rate, as a maximum. It is interesting to observe in this connection, although the consideration does not directly arise in this case, that in cases of infancy sums of a

(1) [1939] 1 K. B. 453, 458.

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similar nature have been upheld, as in the case of *Bailey* v. *Howard* (1), to which I referred, where 1000*l.* was awarded, and *Gambling* v. *Benham* (2), where the amount was 1200*l.* Fortunately, in this case we have not to consider the problem of infancy. When infancy cases are under consideration what I have said as to the assistance which this Court can give to judges and juries by the amounts which it thinks reasonable or unreasonable may possibly be unaffected. In the present case we are dealing with an adult, and the adult case in which this Court has already fixed the damages is the case of *Rose* v. *Ford.* (3) When I regard the decision of *Rose* v. *Ford* (3) as the more important case, I would add in conclusion that that was not a case where this Court said it would not interfere with the assessment by the Court below, but was itself a direct assessment by this Court of what it thought were the proper damages. In my opinion, to give a sum double of what was given in that case to a younger woman in a similar state of health is so excessive an amount that I do not think that it can stand.

Then follows the second problem which I have indicated, what ought to be the right sum. We have come to the conclusion that the proper sum to be awarded in this case is the same sum as that which was awarded in *Rose* v. *Ford* (3), and we think that 1000*l.* should be substituted for 2000*l.* on that head.

Next, I come to the question of the sum to be awarded for the pain and suffering of the deceased. In regard to that matter the evidence is contained partly in a medical report of January 25, 1940, from Mr. M. Young, house surgeon at the London Hospital, which was before the Court, and partly from the evidence of the plaintiff. I regard the medical report as probably the more reliable. The plaintiff was suffering from grievous bereavement. He was not allowed to see his wife on her admission to the hospital, and I should think, if there is any discrepancy, that an objective account of the woman's sufferings is more likely to be found in the medical report.

(1) [1939] 1 K. B. 453.
(2) [1940] 1 All E. R. 275.
(3) [1936] 1 K. B. 90; [1937] A. C. 826.

According to that report, on examination when she was brought in on May 3, she was throwing herself about the bed and was in a state of intense irritation. I rather think that indicates reflex irritation, because the report goes on: "No "response to questions but repeatedly demanded to get up." But she became quieter and the nervous system was normal. On May 7 she became very restless and resented interference, and suddenly at midnight on May 7 her respirations became feeble and dropped to about two per minute, and she suddenly collapsed and died. "The degree of pain," says the doctor, "which she suffered is extremely difficult to estimate owing to "the very marked restlessness. This restlessness was probably "due to cerebral irritation rather than to actual pain." The husband says that when he saw her at the hospital on May 5, she was not conscious in the morning. She recovered consciousness in the afternoon when he went there and then appeared to be very much better. She called him by name and then called for water. She said: "I am on fire, give me "water." He was with her about an hour.

In these circumstances the question arises whether this woman, who was certainly unconscious for the greater part of the time she was in hospital, should rightly be awarded 200*l*. for pain and suffering. One must assume on this heading than on May 7 no further claim could be made. It is not a continuing pain and suffering, it is pain and suffering for those four days and for no more. I need not repeat what I have already said about the assistance and guidance of earlier cases in this Court, because what I have said as to the caution with which such evidence should be used, and as to its value in the case of expectation of life, applies equally in the case of pain and suffering. In *Rose* v. *Ford* (1), to which I have referred, the woman was in the hospital in a state of complete unconsciousness for four days before she died, and her leg had to be amputated. There also it became necessary for us to consider the question of assessing damages, as we had been asked to do so by counsel. I there said (2): "As we have been

(1) [1936] 1 K. B. 102; [1937] A. C. 826.
(2) [1936] 1 K. B. 104.

"asked to assess such damage here by both parties, in my "opinion 20*l*. would be a sufficient sum, more especially "having regard to the fact that the deceased, according to "the doctor, throughout the four days was in a state of coma." That is the sum on which the Court ultimately decided on that head, and on that matter there was no appeal to the House of Lords, nor was there on the allocation of 1000*l*. for loss of expectation of life.

Therefore, applying again reasoning applied in dealing with the first question, I find it impossible to say that 200*l*. is not an excessive sum to give in respect of this woman who was in hospital for four days. True it is that during that time she was conscious for a short time and did say, according to the husband, that she felt on fire and wanted water, but she was mostly unconscious. We think on this head that the proper sum to be awarded is 50*l*. in substitution for the 200*l*. Therefore the judgment will be varied to this extent ; that there will be judgment for 1000*l*. on the claim for loss of expectation of life vested in the administrator, 50*l*. in respect of pain and suffering, and the 28*l*. 10*s*. which remains untouched with regard to the funeral expenses.

CLAUSON L.J. agreed.

GODDARD L.J. On the question of liability and apportionment between the defendants I have nothing to add, nor do I desire to add more on the question of what should be awarded for pain and suffering. As to the amount awarded for loss of expectation of life, which is the important question in this appeal, I think the damages are so excessive as to be an entirely erroneous estimate. For myself, I do not base my opinion on the fact that in *Rose* v. *Ford* (1) a girl of twenty-three was only awarded 1000*l*. by this Court, for one cannot set up any tariff in these cases, but on somewhat broader grounds. Though only a short time has elapsed since *Rose* v. *Ford* (1) was decided in the House of Lords one cannot help observing that damages awarded under this head have increased and are increasing

(1) [1936] 1 K. B. 102 ; [1937] A. C. 826.

and ought, as I think, to be diminished. In my opinion, it is time that this Court showed its disapproval of the award of sums which, as I read the speeches of the two noble and learned Lords who deal in that case with this matter of amount, not only were never contemplated by them but, indeed, offend against the views that they expressed. I will refer to some passages. Lord Wright said (1): "I think both on principle "and on authority this element of damage, that is, for the "shortening of life or for the loss of the normal expectancy of "life, was properly taken into calculation in *Flint* v. *Lovell* (2), "and should be considered here, as Greer L.J. thought. The "jury should be directed that they are entitled to take it into "consideration, along with other relevant elements of damage, "using their common sense to give what is fair and moderate, "in view of all the uncertainties and contingencies of human "life. Special cases may occur, such as that of an infant or an "imbecile or an incurable invalid or a person involved in "hopeless difficulties. The judge or jury must do the best "they can in the circumstances in this as in other cases. The "precedents cited above show that an assessment can be "made." Lord Roche, who deals with this matter at more length than any of the other noble and learned Lords whose speeches are reported, after referring to the case of *Reid* v. *Lanarkshire Traction Co.* (3), said: "In the latter case "Lord Sands, dealing with a similar matter, said: 'Still there "' is something in it which I confess puzzles me, once it is "' conceded that a man is entitled to compensation for the "' shortening of his life. But the matter is so hedged with "' metaphysics that, were I charging a jury, I think I should "' be disposed to be content to tell them that the shortening "' of life was an element which they were entitled to take into "' consideration in measuring the damage suffered by the "' deceased, and to leave it to them, without any strict "' analysis of the content of the idea, to assess the damages, "' contenting myself with warning them that the weight to "' be given to this element must be moderate, and they must

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(1) [1936] 1 K. B. 102; [1937] A. C. 826, 849.
(2) [1935] 1 K. B. 354.
(3) 1934 S. C. 79.

"'not consider what price the man would have put upon his "'life.'" Towards the end of his speech he said (1): "I would "add that I confess to some apprehension lest this element of "damage may now assume a frequency and a prominence in "litigation far greater than is warranted in fact, and becoming "common form may result in the inflation of damages in "undeserving cases, or, more probably perhaps, may become "stale and ridiculous to the detriment of real and deserving "cases, such as the present. But the abatement of these "possible evils may be left to the good sense of judges and "juries, and I may be permitted to express the hope that the "assistance of a jury—in my judgment a most admirable "tribunal for such a purpose—may be not seldom availed of "in the future." I am afraid the present tendency is exactly in the direction that Lord Roche feared and deprecated. I adhere to what I ventured to say in *Gambling* v. *Benham* (2) as to the practical difficulty which arises because of the fact that in spite of the theory of law one is in reality awarding a solatium not to the person who has suffered the wrong but to his relatives or, it may be, even in some cases to his creditors. When one is dealing with an almost metaphysical subject one cannot approach it from the point of view of what is the value to be put on human life. The only guide is that it is to be moderate. We are to eliminate questions of whether the person is rich or poor or, taking again Lord Roche's opinion as a guide, if we except the extreme cases of a miser or a poor man sunk deep in misery, earnings or income are irrelevant. I read this as meaning that for this purpose there is to be no difference between the wife or child of the labourer or of the millionaire and, if I may say so, I respectfully agree with this view. If then we are to try to strike a mean and have regard to the normal and average on this matter upon which there can be no other principle, in my opinion the Court should at least begin to think in hundreds and not in thousands. It should be remembered that *Rose* v. *Ford* (3) shows that loss of expectation of life has always been an element which the

(1) [1937] A. C. 861.

(2) [1940] 1 All E. R. 275.

(3) [1936] K. B. 102; [1937] A. C. 826.

Courts may take and have taken into account, though until the Law Reform Act the question could not have arisen where the injured person had not survived the accident. I am fairly confident that no Court or jury before the Law Reform Act ever added as much as 1000*l.* to the damages awarded to a plaintiff who had survived an accident on this ground, although his chances of a long life may have been seriously impaired. Of course, different minds have different ideas as to what is moderate and seeking for a mean, a normal or an average, where there is really no guide is very like Lord Bowen's illustration of a blind man looking for a black hat in a dark room. If I am right in believing that the true view is that neither station in life nor income nor worldly prospects ought, except in wholly exceptional cases, to influence the award, but that it should be, as near as circumstances permit, and making due allowance for different ages the same for all, I repeat that in my opinion we ought to think in hundreds and not in thousands. Had the task of fixing the damages fallen on me in the first instance, I am not sure that I should have given as much as 1000*l.*, but as that is the figure which my Lords think proper I certainly will not disagree.

Judgment varied.

Solicitor for appellants: *William Charles Crocker.*
Solicitors for first respondent: *Hewitt, Woollacott & Chown.*
Solicitors for second respondent: *Darracotts.*

J. R.

1940
May 30.

THE KING *v.* CITY OF WESTMINSTER ASSESSMENT COMMITTEE.

Ex parte GROSVENOR HOUSE (PARK LANE), LIMITED.

Metropolis—Rate—Rating authority—Objections to provisional list—Assessment committee—Hearing of objections—Disregard of evidence—Certiorari—Mandamus—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47*—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 38.

A rating assessment committee sitting to hear objections to the provisional list under the Valuation (Metropolis) Act, 1869, s. 47, is a judicial body, and is bound to exercise judicial discretion.

At the hearing of an objection, where valuers on both sides had agreed the figures and given their evidence, no other evidence being called :—

Held, that the committee were bound to accept the agreed figures and to determine the case accordingly.

Per Humphreys J. The Rating and Valuation Act, 1925, s. 38, authorizes an assessment committee to employ a competent valuer to give advice and assistance in connection with the valuation of any hereditaments in their area, but this does not enable the committee on the hearing of an objection to the provisional list to insert figures based on the report of a valuer who is not called as a witness and without giving the persons affected an opportunity to deal with it.

THIS was a motion by the applicants, Grosvenor House (Park Lane), Ld., who carried on a hotel and restaurant business in London, that a writ of certiorari should issue to remove into the King's Bench Division for the purpose of being quashed, a determination by the assessment committee of the City of Westminster, given in a letter dated December 19, 1939, that the provisional valuation list be amended by adding to the description of the applicants' hotel premises the words "as affected by emergency legislation, regulations and orders," and substituting for the values appearing in the list the following values, namely, "gross value, 25,800*l.* ; net annual rateable "value, 21,497*l.*" There was also a motion for an order that a writ of mandamus should issue to the assessment committee

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to determine the above objection "by substituting for the "values entered in the list in respect of the above premises "the following values—gross value, 16,125*l.*; net annual "rateable value, 13,434*l.*"

The following statement of the facts is taken substantially from the judgment of Charles J.

On October 14, 1939, the clerk to the assessment committee sent to the surveyors for the applicants notice that the rating authority had sent to the assessment committee a provisional valuation list in which the applicants' premises had been entered for assessment at 32,250*l.* gross, and 26,872*l.* net rateable value. On October 25, 1939, Mr. Faraday, a member of the firm of surveyors, on behalf of the applicants, gave notice of objection to the provisional list, and on the same day, appeared before the assessment committee to support it. At the hearing of the objection Mr. Faraday argued that the assessment was too high, because the war had produced that which should be regarded in law as causes which would justify a reduction of the gross and rateable values of the hereditament. The assessment committee asked Mr. Faraday to meet the city valuer, Capt. Bourdas, and try to agree with him the amount of the assessment to be put on the applicants' premises. Mr. Faraday, accompanied by a Mr. Fleck, met Capt. Bourdas; and they decided that the proper value to be inserted in the list was the figure of 16,125*l.* gross, and 13,434*l.* net rateable value. On December 6 they indicated to the assessment committee the result of their deliberations. The committee, however, amended the list by inserting values of 25,800*l.* gross, and 21,497*l.* net, annual rateable value. According to the affidavit of Mr. M. G. Giles, "in considering its decision, the "committee had before it not only the figures as to trade "supplied by Mr. Faraday for each of the said hotels, but also "his arguments as to the principles to be applied and the "city valuer's reply . . . . The committee also had the "advantage of a general report from Mr. Charles Gerald Eve "as to the effect of the war on the value of various classes "of business premises, including hotels, and as to the factors "producing such effect." The affidavit added that the committee had their own general knowledge and experience, and had considered a large number of other cases and so came to the conclusion in question.

The applicants moved for writs of certiorari and mandamus, alleging that the committee should have confined their consideration to the only evidence before them—that of Mr. Faraday and the city valuer, and also that the committee had no power to enter in the provisional valuation list any values other than those agreed by these two persons, whose evidence they had heard.

Comyns Carr K.C. and *F. Grant* for the applicants. The figures of 16,125*l.* gross, and 13,434*l.* net, annual rateable value were agreed between persons who are virtually the parties in the case, and that being so, the assessment committee should have given effect to the agreement. Mr. Faraday and the city valuer, meeting at the request of the committee, had ample powers to agree the figures, and it was the duty of the committee, sitting under s. 47 of the Valuation (Metropolis) Act, 1869, to act on their evidence and not to consult other persons behind the backs of the persons interested. This is not a case for re-trial as is usual on motion for mandamus. All the materials are present, and the order to the tribunal should be to hear and determine.

R. M. Montgomery K.C. and *M. E. Rowe* for the respondents. The committee had a discretion to employ outside assistance in arriving at the proper figures: Rating and Valuation Act, 1925, s. 38. An outside valuer so appointed can give advice and use his own experience and knowledge in calculating the figures. "The proceedings before the assessment committee "are of a very informal nature, and in no sense an appeal to "a Court": per Lord Carson in *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (1)

[CHARLES J. That was a different statute—the Union Assessment Committee Act, 1862, s. 18.]

The assessment committee is not a court, although we admit that it must exercise its discretion judicially. The committee

(1) [1925] A. C. 309, 334.

can "make such order as they think just": Valuation (Metropolis) Act, 1869, s. 47, sub-s. 6. Even if no objection is made to the figures in the provisional list, they can alter them: *Rex* v. *Westminster Assessment Committee. Ex parte Black.* (1)

In questions of value the committee are entitled to have the assistance of a general report, even if they do not appoint a valuer under s. 38 of the Act of 1925, and there is no reason why they should disclose this to the parties.

Comyns Carr K.C. in reply. By the Act of 1925, Fourth Schedule, Part III., para. 3, "any valuer employed by the "assessment committee to value the hereditament to which the "objection relates may be called as a witness." The statute thus indicates that if the committee ask for independent expert opinion it should be given in open court.

CHARLES J. [after stating the facts as above:] It appears to us that when an assessment committee sit to hear objections, they are a judicial body. That, indeed, is not disputed. They hear evidence, and they have to determine on that evidence. It is contrary to every known principle of justice that, having heard evidence, particularly the type of evidence with which we are concerned here, evidence which was all one way, they should afterwards consider a report from someone who has never been near the inquiry, the contents of that report being unknown to anybody except the committee, and say that they have been influenced in their mind by that report.

In our view the ordinary rules ought to apply. Those rules, as applied to this case, are as follows. The committee heard the objection and the evidence on both sides. Both sides agreed that the figure of 16,125*l.* gross and 13,434*l.* rateable was the only right and proper figure at which to arrive. If the committee had eliminated Mr. Eve's report, which we hold was improperly considered, there was only one conclusion at which they could have arrived, namely, that the figures given by the city valuer and Mr. Faraday were the right figures. That is the only evidence they had, and, if they were

(1) [1933] 2 K. B. 482.

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to determine this matter in accordance with law, they ought to have accepted those figures.

The result is that we order that the writ of certiorari shall issue, so that the determination of the assessment committee may be quashed, and also, that a writ of mandamus shall issue to the committee, to hear and determine the matters which the objectors ask should be determined according to law. I have already indicated what, in my view, that determination should be, but the writ must simply be "to hear "and determine."

HUMPHREYS J. I have arrived at the same conclusion. The first application here is for an order of certiorari to quash an entry in a provisional list made by the direction of the assessment committee. It is not disputed (and to my mind it is abundantly clear) that that assessment committee, sitting as it was under the Valuation (Metropolis) Act, 1869, s. 47, was a judicial body, although not a court, and, therefore, was bound to exercise a discretion, and to exercise it judicially.

There are two grounds upon which we are asked to order the certiorari to issue. The first is that there was no evidence before the assessment committee to support the entry in the valuation list which was ordered, that is, a gross value of 25,800*l.* and a net annual rateable value of 21,497*l.* If that is made out it is a ground on which we are bound to order certiorari to issue. The second ground is that the assessment committee "in determining the said objection had no power "to insert in the provisional valuation list any values other than "the values so agreed." Again I agree that that correctly states the legal position. The tribunal was bound to exercise a judicial discretion, and, having had before it the evidence of one person who might properly be described as a party to the proceedings, that is, the ratepayer who was appealing, and of another, the city valuer, on behalf of the city rating authority, and having heard that those two persons had agreed on certain figures, there was no jurisdiction in the tribunal to insert in the provisional valuation list any figures other than those which had been agreed. I am not saying that the assessment committee was bound in those circumstances to enter at that time those figures in the valuation list. It may well be, although it is not necessary to decide it, that, if the assessment committee for some reason, such as their own local knowledge, was not satisfied with the figures which had been agreed between the parties, they might have asked the parties to provide them with further evidence which would help them in the matter, or they might have intimated the difficulties which they felt that the parties might deal with them. In other words, they might have continued to hear the matter and have heard any evidence which the parties—I use the word "parties" not in the technical sense but as meaning the persons before them—were disposed to offer to them. But I entertain no doubt that they had no jurisdiction to do what they did, that is, to pay no attention to the agreed figures which the city valuer on the one hand, and the ratepayer's valuer on the other, had asked them to insert in the provisional list, but to invent a figure of their own and order that that be entered. No one had suggested that particular figure, and the ratepayer and the city valuer would both have no idea of the basis on which it was reached. On those grounds, therefore, certiorari is bound to go.

Without adding to what my Lord has said, I would refer to the argument of Mr. Montgomery who urged that was perfectly proper in this case because it was specifically allowed by s. 38 of the Rating and Valuation Act, 1925. I profoundly disagree with that suggestion. That section authorized any rating authority or any assessment committee or any county valuation committee to employ a competent valuer whom they could not employ without the authority of the section, because they would have no money to pay him with. That I believe to be the explanation of the section. It authorizes the employment of a competent valuer "to give advice and "assistance in connection with the valuation of any heredita- "ments in their area, and any person so employed shall have "power to go and examine and enter the hereditament which "he has been asked to value." Those provisions give the

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valuer authority, which no ordinary person has, to go into a person's house whether he likes it or not, and look at it for the purposes mentioned. Does that authorize an assessment committee to take that course on the hearing of an objection as distinct from when the committee are valuing the hereditament which they have to do whether any objection is taken or not? Without deciding the matter or expressing any opinion on it I will assume that it does. Was it done in this case? There is no evidence before us to support the suggestion that Mr. Eve had been appointed under s. 38. Mr. Montgomery, indeed, agreed that it was extremely unlikely that Mr. Eve had ever had his attention called to the fact that the applicants had appealed against the valuation of the hereditament in this case, or knew anything whatever about it. So far from there being any statement to the effect that Mr. Eve was appointed to assist the committee under s. 38, all that is said is that he had made some general report. We do not even know whether he had made it to the committee, or whether he had made it to all the assessment committees of London, or whether he had made it to any other body. It is said that he had made a general report as to the general nature of the effect of the war and the regulations resulting from the war on such buildings as theatres and hotels. In my view, it is quite wrong to say on the evidence in this case that Mr. Eve had ever been appointed under s. 38.

But, supposing he had been so appointed, what would the result be? Does that authorize this judicial tribunal to accept that report as evidence without giving the parties an opportunity of hearing what it is? The answer is to be found, as Mr. Comyns Carr has said, in the Fourth Schedule of the Rating and Valuation Act, 1925, which deals with what is to be done where an assessment committee does appoint such a surveyor. I am not troubled by the fact that in making this Act applicable to London, as has been done by a later Act, there has been an omission to make the Schedule of the Act so apply. Sect. 38, however, is to apply to London and, that being so, I have no doubt myself that those parts of the schedule which deal with s. 38 must also be taken to apply to London.

The Fourth Schedule, Part III., para 3, says: "On the "consideration of an objection any valuer employed by the "assessment committee to value the hereditament . . . . may "be called as a witness." That seems to me to be sufficient indication to dispose of the argument that any authorization is given by this statute to the use of the opinion of such a person as against evidence which is given in open court without giving the parties an opportunity of dealing with it.

My view being, therefore, that certiorari ought to go in this case, what is the result? We have been invited by Mr. Comyns Carr to order a mandamus to issue. It is clear that we must do so, because, having ordered that certiorari should issue to quash the order, something must be substituted for the order giving figures of value. Mr. Carr has invited us to make an order that mandamus should go direct to the assessment committee to enter the figures which were agreed on between the valuers. I do not think we have any power to make such an order in those terms. The only order we can make in such a case as this is not to direct a mandamus to issue in the nature of an injunction, but to direct that a mandamus should go "to hear and determine according to "law." That means to hear and determine so far as necessary according to law. In this case the tribunal have said that they have heard all the evidence which they desire to hear. The parties have been invited to produce any further evidence if they desire to do so, and both the ratepayer on the one hand, and the city valuer, on behalf of the valuation authority, on the other hand, have said that they do not wish any further evidence to be produced. It falls to the assessment committee, in obedience to the mandamus which I think ought to issue, to decide what in law are the figures which they are bound on the evidence before them to order to be entered in the provisional list. For my own part, I know of no other figures than those which have been agreed on by the two valuers. Therefore, I think, the effect of the mandamus in this case ought to be that those figures be entered as the proper figures of gross and rateable value respectively. But, for the reasons I have given, I do not think it possible to direct it in any other form than that a mandamus should go "to hear and determine." In this case it is practically to determine according to law that which has already been heard.

ASQUITH J. I agree.

Orders for certiorari and mandamus.

Solicitors for applicants: *Richardson, Sadler & Co.*
Solicitors for respondents: *Allen & Son.*

F. P. F.

R. & A. KOHNSTAMM, LIMITED *v.* LUDWIG KRUMM (LONDON), LIMITED.

1940
May 21.

[1939. R. No. 1793.]

Emergency legislation—Trading with the enemy—Guarantee by English guarantor of enemy debtor—Action on guarantee—Discharging obligation of an enemy—Receiving payment in respect of transaction under which all obligations performed—Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 1, *sub-s.* 2 (*a*) (*iii.*) ; *sub-s.* 2, *proviso* (*ii.*).

English company—Enemy shareholders—Assets vested in Controller—Judgment against company—Application to Court to enforce judgment—Application directed to be made to Master—Courts (*Emergency Powers*) *Act*, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1.

By a guarantee in writing the defendants, an English company guaranteed payment to the plaintiffs, another English company, for goods to be supplied by the plaintiffs to a German company. Almost all the defendants' shares were held by the German company. Before the outbreak of the present war the plaintiffs had sold and delivered to the German company certain goods, the price of which had not been paid. After the war had begun the plaintiffs brought an action against the defendants claiming payment of the price of these goods :—

Held, (1.) that the plaintiffs by recovering the amount which they claimed from the defendants should not " be deemed to " have traded with the enemy " within the meaning of the Trading with the Enemy Act, 1939, s. 1, sub-s. 2 (*a*) (iii.), inasmuch as by accepting payment of that amount from the defendants, as guarantors, they would not discharge any obligation of the German company, who, as principal debtors, would still remain liable for the amount to the defendants ;

(2.) that the plaintiffs should " not be deemed to have traded " with the enemy " within the meaning of s. 1, sub-s. 2, proviso (ii.), of the Act, since, the transaction being one under which all the obligations on their part had been performed, the plaintiffs by virtue of that proviso would not be deemed to have traded with the enemy by receiving payment from the German company itself, and therefore should still less be deemed to have traded with the enemy by receiving payment from the defendants, an English company, as guarantors for that company.

Where almost all the shares of an English company were held by enemy shareholders and all its assets were vested in the custodian of enemy property, the Court, having given judgment for a creditor of the company against the company, declined in the circumstances to entertain an application under the Courts (Emergency Powers) Act, 1939, for the immediate enforcement of the judgment, but directed that the application should be made to the Master in Chambers.

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R. & A. Kohnstamm, Ld. v. Ludwig Krumm (London), Ld.

Action tried by Macnaghten J. without a jury.

Messrs. R. & A. Kohnstamm, Ld., hereinafter called "the "plaintiffs," were a company formed under the Companies Acts and registered in England, who dealt in leather of various sorts.

They had for many years had dealings with Messrs. Ludwig Krumm A.G., hereinafter called "the German company," who were manufacturers of leather goods carrying on business at Offenbach in Germany.

Messrs. Ludwig Krumm (London), Ld., hereinafter called the defendants, were a company formed under the Companies Acts and registered in England with a capital of 3000*l.* divided into 3000 ordinary shares of 1*l.* each, all, or nearly all, of which were held by the German company, and they also dealt in leather.

The German company appointed the defendants to act as their agents in the United Kingdom for the purchase of leather and the sale of their manufactured goods.

In January, 1936, the difficulties of trading with Germany had become considerable owing to German legislation, and the plaintiffs were unwilling to continue to do business with that company except upon a guarantee by the defendant company to be responsible for the debts due from the German company to the plaintiffs.

On January 21, 1936, the plaintiffs wrote to the defendants: "Referring to our representative (Mr. Short's) call upon you "this afternoon, we have noted with thanks your order for "certain goods at a specified price. We note to send these "goods by Schenkers Express to your firm in Offenbach, but "for regularity's sake beg to state, as already verbally "mentioned by our representative, that we understand you "to hold yourselves responsible in every way for this and any "further orders placed with us, as owing to the existing "exchange difficulties we cannot accept orders from or for "German clients without such guarantee from a firm "domiciled in England. Your acknowledgment will much "oblige"; and on the following day, January 22, 1936, Mr. Krumm, one of the directors of the defendant company, wrote and signed the following letter to the plaintiffs: "I "beg to acknowledge receipt of your letter of the 21st January "and would confirm again that this company holds itself "responsible in every way for goods bought by our factory in "Offenbach."

The plaintiffs alleged that these letters constituted a guarantee in writing by which the defendants guaranteed payment to the plaintiffs, for goods to be supplied to the German company.

Between July 20 and August 11, 1939, the plaintiffs sold to the German company four parcels of leather, the price of which, amounting in all to 594*l.* 12*s.* 3*d.*, had not been paid.

The plaintiffs had delivered each of these parcels of goods before the commencement of the present war, either to the German company or to the carrier by whom they were to be conveyed to that company.

On September 25, 1939, the plaintiffs brought this action against the defendants, on the guarantee claiming payment of the said sum.

The defendants, in their defence, pleaded (inter alia) that they relied upon the Trading with the Enemy Act, 1939, s. 1, sub-s. 2 (*a*) (iii.); sub-s. 2, proviso (ii.). (1)

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(1) Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89), s. 1: "(1.) Any person who trades "with the enemy within the meaning of this Act shall be guilty of "an offence of trading with the "enemy . . . .

"(2.) For the purposes of this "Act a person shall be deemed to "have traded with the enemy—

"(*a*) if he has had any commercial, financial or other intercourse or dealings with, or for "the benefit of, an enemy, and, "in particular, but without prejudice to the generality of the "foregoing provision, if he "has— . . . .

"(iii.) performed any obligation to, or discharged any "obligation of, an enemy, "whether the obligation was "undertaken before or after the "commencement of this Act;

". . . .

"Provided that a person shall "not be deemed to have traded "with the enemy by reason only "that he has—

"(i.) done anything under an "authority given generally or "specially by, or by any person "authorised in that behalf by, "a Secretary of State, the "Treasury or the Board of "Trade, or

"(ii.) received payment from "an enemy of a sum of money "due in respect of a transaction "under which all obligations on

G. O. Slade and *V. K. Wolff*, for the plaintiffs.

Cyril Salmon for the defendants.

The arguments of counsel fully appear from the judgment of Macnaghten J. as set out below. On behalf of the defendants reference was made to the observations of Lord Wright M.R. in *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Brothers* (1); and to Maxwell on the Interpretation of Statutes, 8th ed., p. 4.

MACNAGHTEN J. In this action R. & A. Kohnstamm, Ld., a company formed under the Companies Acts and dealing in leather, sue Ludwig Krumm (London), Ld., another company formed under the Companies Acts and also dealing in leather, to recover the sum of 594*l.* 12*s.* 3*d.*, as due from the defendants to them under a guarantee given in January, 1936, whereby it is alleged that the defendants guaranteed a German company called L. Krumm A.G. in Offenbach in Germany. [His Lordship stated the facts as above set out, and continued :]

Various points have been raised on behalf of the defendants, whose property has been vested in the Custodian under the Trading with the Enemy Act, 1939. It was said that these letters did not constitute a guarantee because the company or firm guaranteed was not clearly identified. That contention must fail, in view of the fact that business relations had existed between the German company in Offenbach, the defendant company in London, and the plaintiff company in London for a number of years. There cannot be the smallest doubt as to what is meant by "your "firm in Offenbach" in the letter of January 21, 1936, or "by our factory in Offenbach" in the letter of January 22, 1936. Those words plainly mean the German company and nothing else. It is, therefore, a perfectly plain guarantee by the London company, the defendant company, of any debt that the German company might owe to the plaintiff company for goods supplied.

Then it was said that there had been no proof of the delivery

"the part of the person receiving "payment had been performed "before the commencement of "the war by reason of which "the person from whom the "payment was received became "an enemy."

(1) [1937] 1 K. B. 534, 544.

1940

R. & A. KOHNSTAMM, LD. *v.* LUDWIG KRUMM (LONDON), LD.

Macnaghten J.

of the goods in question. I am satisfied that that point also fails. As a matter of fact, the goods were always, or at all events in 1939, despatched to Offenbach by means of a carrier in London called the British Commercial Transport Co. The goods that are sued for were delivered to that company on the four dates mentioned in the statement of claim endorsed on the writ of summons. Apart from the fact that as to some of the goods actual letters are produced from the German company acknowledging their receipt, I think Mr. Slade is right in saying that s. 32 of the Sale of Goods Act, 1893, covers the case. That section provides: "Where, in "pursuance of a contract of sale, the seller is authorised or "required to send the goods to the buyer, delivery of the "goods to a carrier, whether named by the buyer or not, for "the purpose of transmission to the buyer is prima facie "deemed to be a delivery of the goods to the buyer."

I come now to the first point put forward by Mr. Salmon, which seemed to me to be one of some substance. It was that the defendants would be committing an offence under the Trading with the Enemy Act, 1939, if they were to pay the money sued for in this action. The provision upon which he bases that argument is s. 1, sub-s. 2 (*a*) (iii.), which provides: "For the purposes of this Act a person shall be deemed to "have traded with the enemy—(*a*) if he has . . . . dis"charged any obligation of an enemy, whether the obligation "was undertaken before or after the commencement of this "Act." The defendant company by paying the debt due from the German company to the plaintiffs would, as he said, be discharging the obligation of the German company. But the sub-section contains the following proviso: "Provided that "a person shall not be deemed to have traded with the enemy "by reason only that he has . . . . received payment from an "enemy of a sum of money due in respect of a transaction under "which all obligations on the part of the person receiving "payment had been performed before the commencement of "the war by reason of which the person from whom the "payment was received became an enemy." The plaintiffs, who had performed all their obligations towards the German company, would not be deemed to have traded with the enemy if they received payment of this debt of 594*l.* 12*s.* 3*d.* from the German company. In those circumstances it seems to me that the provision in s. 1, sub-s. 2 (*a*) (iii.), that a person shall be deemed to have traded with the enemy if he has discharged any obligation of an enemy, cannot apply to a case where an English company, having given a guarantee of the debt of an enemy, performs its obligation under the contract of guarantee; for this would lead to this absurd result, that although a creditor might receive payment from the enemy, yet he cannot receive payment from a British subject who has guaranteed the debt of the enemy.

Mr. Salmon called my attention to a sentence in Lord Wright's judgment in the case of *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Brothers* (1), where Lord Wright said (2) of the case which he was dealing with then: "The case is "analogous to that of a payment by a surety which has the "effect of discharging the principal's debt and which, there-"fore, gives a right of indemnity against the principal"; that is to say that the surety, discharging the duty of the principal himself then becomes creditor of the principal for the amount that he has paid. Although in one sense the defendants in this case by paying, in accordance with the obligation that they had entered into under the contract of guarantee, discharge the German company from its obligation to pay the plaintiffs, they thereby create an obligation on the part of the German company to pay the same sum to them, the defendants, themselves, and I think the words "discharged "any obligation" in s. 1, sub-s. 2 (*a*) (iii.), of the Trading with the Enemy Act mean a complete discharge, not a mere transfer of the obligation to pay this sum of money, from an obligation to pay it to A. into an obligation to pay it to B. The obligation of the German company, the obligation of the enemy, has not been discharged. It has still to be met. Therefore I think that proviso (ii.) of sub-s. 2 of s. 1 of the Trading with the Enemy Act precludes the defendants from relying upon the Trading with the Enemy Act as a ground for failing to perform the obligation which they had entered into.

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(1) [1937] 1 K. B. 534.

(2) Ibid. 544.

I, therefore, think the plaintiffs are entitled to recover the sum sued for in this action, and there will be judgment in their favour for that amount with costs.

Judgment for plaintiffs.

V. K. Wolff. I ask for leave to proceed under the Courts (Emergency Powers) Act, 1939.

Cyril Salmon. The Court should not grant this application. Everything that the company has is in the possession of the Custodian. It may be that there are other debts of the company, and the Custodian may say that it would not be fair to pay the whole of this debt now and not pay the other debts, or he may say that this debt ought to be paid in instalments. Moreover, it would seem that this company's business, because of the war, has been wound up, and I understand that the company has done no business since September 3, 1939, except collecting assets and paying debts. I would suggest that in default of the parties agreeing, the most convenient way of dealing with this matter would be the usual one of referring it to the Master.

MACNAGHTEN J. The Custodian was perfectly right to defend the action. What else was to be done? Here was a claim made against a company which is really a German company. Obviously nobody in Germany could come and defend the action, and the Custodian was perfectly right to defend it, and to see that the claim was well founded. Perhaps Mr. Salmon will carry his argument to another Court, and it may be that the Custodian will think it would be better, when he knows more about the whole of the transactions of the company, to keep the fund for the time being. I think that any application for leave to proceed should be made by summons in Chambers.

Order accordingly.

Solicitors for plaintiffs: *Wordsworth, Marr Johnson & Shaw.*
Solicitors for defendants: *Buckeridge & Braune.*

J. R.

1940
June 11, 12, 13.

FORSYTH *v.* THOMPSON.

Revenue—Income tax—Profit or gain—Annual payment to member by mutual insurance society—Annual payment on condition of payment of premiums during benefit—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Case III., r.* 1 (*a*).

The appellant, a member of two mutual insurance societies, entered into contracts with them under which he was entitled to receive certain weekly payments in the event, which happened, of permanent disability through accident, subject to the continued payment by him of premiums during benefit:—

Held, that the premiums paid by the appellant were deferred payments of a lump sum payable for an annuity or annual payment, so that the appellant was assessable to income tax under the Income Tax Act, 1918, Sch. D, Case III., r. 1 (*a*), in respect of the payments made to him by the societies.

A contract between a mutual society and a member thereof, whereby the latter receives an annuity or annual payment within the meaning of r. 1 of Case III. of Sch. D to the Income Tax Act, 1918, is on the same footing as a similar contract with a proprietary company.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the Commissioners on July 11, 1939, the appellant, Leonard W. Forsyth, a dental surgeon, appealed against six additional assessments to income tax in the sums of 317*l.*, 370*l.*, 369*l.*, 350*l.*, 372*l.* and 368*l.* for the years ended April 5, 1933, to April 5, 1938, inclusive (described as disablement benefit) and an assessment of 396*l.* for the year ending April 5, 1939 (described as pensions), raised under s. 125, sub-s. 1, of the Income Tax Act, 1918.

Since 1904 the appellant had been a member of the Medical Sickness, Annuity and Life Assurance Society ("the medical "society"), and since 1908 a member of the Dentists' Provident Society ("the provident society"). The medical society was founded in 1884 as a friendly society, and in 1920 was incorporated under the above name. The provident society was registered under the Friendly Societies Acts in February, 1908.

As a member of the medical society, the appellant (subject to continued payment of premiums during benefit) was entitled to 12*l.* 12*s.* a week during the first six months of sickness and 6*l*. 6*s*. a week thereafter. As the holder of eight shares in the provident society he was entitled to 4*l*. a week for the first six months of sickness and 1*l*. 6*s*. 8*d*. thereafter. On January 2, 1931, the appellant was permanently disabled by accident from carrying on his profession. After that date he continued to pay the premiums on the sickness benefit insurances mentioned and so received benefits from both societies on the scales specified. These benefits were not regarded by the inspector of taxes as taxable, but for the year ended April 5, 1939, the appellant returned under the heading "Office, Employment or Pension," "Medical Society 328*l*. 10*s*., "Provident Society 68*l*. 8*s*." Those sums had not been taxed at the source, and he was assessed on them.

The Commissioners held that the benefits paid to the appellant were annual payments within the Income Tax Act, 1918, Sch. D, Case III., r. 1.

The appellant appealed.

Heyworth Talbot for the appellant.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

The arguments are fully set out in the judgment.

LAWRENCE J. It has been argued on behalf of the appellant, first, that the payments which he received from these societies were not annual payments within the meaning of Case III. of Sch. D to the Income Tax Act, 1918, because the annual premiums only secured compensation for the year for which they were paid, and the appellant was only entitled to be re-insured by a fresh payment at the beginning of the next year. Secondly, it was said that the payments were not annual payments within the Case because any one of them might never occur or never recur, depending on the contingency of the appellant's becoming ill; and it was argued that the payments were analogous to payments under accident policies which, it was said, would not be annual payments taxable under the Income Tax Acts. Thirdly, it was said that the payments were not annual payments because they were not all profit in the hands of the recipient in so far as he had to pay for each annual payment in its year. Lastly, it was said that, these being mutual societies, on the authority of *New York Life Insurance Co.* v. *Styles* (1), there was no element of profit or gain in the matter, but that the appellant simply had a right under his contracts with the societies to get back his own money in certain circumstances, and that the surplus of such a society not being taxable, sums of money paid to members of the society under their individual contracts with the society were not taxable.

On behalf of the Crown it was argued that the sums paid to members of a mutual society under their individual contracts, which might be contracts for annuities, stand on an entirely different footing from the surplus which was dealt with in *New York Life Insurance Co.* v. *Styles* (1), and it was insisted that a member who has entered into an annuity contract with a mutual society is getting very much more than his own money and that there is a profit element in it. In that connection *J. Gliksten & Son, Ld.* v. *Green* (2) was relied on, and also *Thomas* v. *Evans* (3), in which it was held that the payment of premiums by a member of a mutual society was deductible. It was also pointed out that it was very remarkable if there were no element of profit in an annuity purchased by a member from a mutual society when there is an element of profit in an annuity purchased from a proprietary company, having regard to the fact that on ordinary business principles the member of the mutual society obtains a greater profit under his annuity than would a person who took out an annuity with a proprietary company. It was also argued that sick pay such as is in question in this case is really in substitution for the professional income of the member of the society, as is shown by the fact that a professional man is not entitled to carry on his business while he is in receipt of sick pay, and in that connection *Rex* v. *B. C. Fir and Cedar Lumber Co., Ld.* (4), was relied on.

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(1) (1889) 14 App. Cas. 381; 2 Tax Cas. 460.

(2) [1929] A. C. 381; 14 Tax Cas. 364.

(3) [1927] A. C. 827 (sub nom. *Jones* v. *South-West Lancashire Coal Owners' Association, Ld.*); 11 Tax Cas. 790.

(4) [1932] A. C. 441.

On the question whether the payment had the necessary element of recurrence, *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* (1) was relied on, and in particular the observations of Lord Macmillan, where he said: " At your "Lordships' Bar it was argued for the appellants that the "payments were not annual payments inasmuch as they were "casual, independent, not necessarily recurrent, and throughout subject to a contingency. This argument commended "itself to Lord Moncrieff, but I am unable to accept it. There "was a continuing obligation extending over each and all "of the five years to make a payment to the trustees for the "shareholders in the event of the company earning no profits "or insufficient profits. The fact that the payments were "contingent and variable in amount does not affect the "character of the payments as annual payments." So here it was argued that the fact that the payments were contingent on sickness did not prevent them being annual payments. On the other hand, on behalf of the appellant, this case was distinguished on the ground that here there was no continuing obligation beyond the year and that the contract is to be looked at as a contract for one year, so that a payment under it is not an annual payment. It is said that whereas in *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* (1) there was a continuing obligation, yet in this case there was no continuing obligation, because directly the appellant ceased to pay the premiums the obligation of the mutual societies ceased. The Attorney-General's answer to that argument was that that was merely a term of the contract; that the payment for what was in reality an annuity was to be extended over the period of the appellant's life up to sixty-five years of age; that it did not cease to be an annuity because the terms of the contract provided that, instead of one single sum being paid for it, a series of sums were to be paid; and that, in the event of their not being paid, the annuity would cease; and in that connection he drew attention to the words of Case III., r. 1 (*a*), that the tax shall extend to an annual payment whether such payment is payable " as a personal debt or obligation by virtue of any

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(1) [1937] A. C. 785, 793; 21 Tax Cas. 264, 298.

"contract." If it is otherwise an annual payment, he contended that the fact that the contract had this term did not prevent it from being an annual payment.

He also referred, in considering the question of an accident policy, to *Renfrew Town Council* v. *Inland Revenue Commissioners* (1), and to the observations of the Lord President Clyde. In commenting on those observations the Attorney-General submitted that the real question was what payment was really made ? If a payment were a lump sum payable under an accident policy, it would probably fall to be considered as a capital receipt. If, on the other hand, under the terms of the policy an assured was entitled, in the event of accident, to receive payments over a period of time, those payments might have the character of annual payments within Case III. As the Attorney-General said, a man might purchase a variety of articles, or he might purchase an annuity. He would not be taxable in respect of goods which he purchased, but he would be taxable in respect of an annuity. He might take out an insurance, and if that insurance were in the course of his trade and were an insurance of his stock-in-trade, as in *J. Gliksten & Son, Ld.* v. *Green* (2), and the *British Columbia* case (3), he would be taxable in respect of the proceeds of that insurance although he would not be taxable in respect of the proceeds of an insurance of some capital asset.

The appellant's counsel distinguished *Thomas* v. *Evans* (4), on the ground that that was a case of a trade. He said that although it was right in the case of a trade to deduct premiums paid to a mutual insurance society and to credit in the computation of the profits of that trade sums received from a mutual society, yet that did not apply to cases of non-traders, but that, in the case of non-traders, the principle of *New York Life Insurance Co.* v. *Styles* (5), that the surplus of such a society as that with which I am dealing was not taxable, was applicable to the contracts which members of a mutual

(1) (1934) 19 Tax Cas. 13, 18, 19.

(2) [1929] A. C. 381 ; 14 Tax Cas. 364.

(3) [1932] A. C. 441.

(4) [1927] A. C. 827 (sub nom. *Jones* v. *South-West Lancashire Coal Owners' Association, Ld.*) ; 11 Tax Cas. 790.

(5) 14 App. Cas. 381 ; 2 Tax Cas. 460.

insurance company make with the company for annuities or for other payments to them, and that those payments have no element of profit in them. He again insisted, in his reply, on his argument that the payment to the appellant in the present case was not an annuity because it depended on his payment of a premium or premiums in the year in which the appellant fell sick or was entitled to sick pay.

In my opinion, it is impossible to draw the distinction which is sought to be drawn on behalf of the appellant on the ground that these were mutual societies. In my opinion, the sums payable by a mutual society to its members under their individual contracts with the mutual society are to be considered on the same basis as sums payable under similar contracts with a proprietary company, and if they result in annual payments or payments of annuities the recipients are taxable in respect of those annual payments or annuities. Nor is there anything, in my opinion, in the argument advanced on behalf of the appellant that these contracts are to be looked at as contracts which determine at the end of each year. It is, in my opinion, the true view that the payment for these annual sums is merely deferred. It is merely a term of the contract which the appellant has entered into that he should continue to pay either annually or half-yearly, or monthly, and, if he does not pay, he ceases to have any right under the contract. In my opinion, that does not prevent the sums which he receives being annual payments within Case III., and in these circumstances I am of opinion that the finding of the Commissioners was right.

Appeal dismissed.

Solicitors for appellant: *Hempsons.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

1940
June 3, 14.

COMMISSIONERS OF INLAND REVENUE *v.* PAYTON.

Revenue—Income tax—Sur-tax—Covenant by respondent in deed to pay one-fourth of income to trustee—Definition of " income " in deed—" Income of settlor as computed for the purpose of the Income Tax " Acts " — Construction — Undistributed income of company — Apportionment of part of income to respondent—Assessment to sur-tax upon respondent in name of company—Payment by respondent to trustee of one-quarter of sum apportioned to him—Return of income for purposes of sur-tax—Allowable deductions—Whether sum apportioned to respondent was properly included in his income—Whether one-quarter of sum was payable to trustee and therefore deductible in return for sur-tax—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21*—Finance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 14), *s.* 24*—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 20.

By a deed of covenant the respondent covenanted to pay every year to a trustee an annual sum equal to one-fourth of his income less income tax. The expression " income " was defined in the deed as " the income of the settlor as computed "for the purpose of the Income Tax Acts, but excluding therefrom "such income as may accrue to him as a member of an underwriting syndicate at Lloyd's, and after deducting therefrom all "annual sums, annuities or interest (excluding the sum payable "under this deed) as are allowed as deductions in computing "total income for the purpose of the said Acts." Certain directions were made by the Special Commissioners upon a certain company under s. 21 of the Finance Act, 1922, as extended by s. 20 of the Finance Act, 1936, for the year ending December 31, 1935, and the period from January 1 to February 3, 1936, and they apportioned the sum of 45,484*l.* out of the actual income of the company for the said periods to the respondent. An assessment to sur-tax for the year 1935–36 under s. 21, sub-s. 2, of the Finance Act, 1922, was made upon the respondent in the name of the company in the sum of 45,484*l.* The respondent claimed that in consequence of such assessment he was liable under the deed to pay a sum of 11,371*l.* to the trustee under that deed, and in fact he paid such sum less income tax to the trustee. The respondent, having paid sur-tax on the sum of 45,484*l.*, claimed that he was entitled to relief from sur-tax on 11,371*l.* under s. 24 of the Finance Act, 1923, by reason of an error or mistake :—

Held, that the income of the settlor as computed for the purpose of the Income Tax Acts did not include sums which were apportioned to him under s. 21 of the Finance Act, 1922; such sums were not his income; and that therefore he was not entitled to relief from sur-tax on 11,371*l.* paid by him to the trustee under the deed.

CASE stated under the Income Tax Act, 1918, s. 149, and the Finance Act, 1923, s. 24, as extended to sur-tax by s. 42, sub-s. 3, of the Finance Act, 1927, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on November 18, 1938, Mr. Ernest L. Payton (hereinafter called the respondent) appealed against the determination of the Commissioners of Inland Revenue refusing relief from sur-tax paid by him under an assessment made upon him for the year 1935–36, which the respondent alleged was excessive by reason of an error or mistake in the return or statement made by him for the purposes of such assessment.

In his return of income from all sources for the year 1935–36, rendered on June 25, 1936, the respondent had made no deduction in respect of a sum of 11,371*l.* alleged to be payable by him under an indenture dated March 22, 1935, hereinafter referred to. The respondent now claimed that this sum was an allowable deduction in computing his liability for sur-tax for the year in question.

Two questions arose for decision in this case, firstly, whether the sum of 11,371*l.* was due and payable under the said indenture of March 22, 1935, and secondly (1), if it were, whether the respondent was entitled to relief in respect thereof by reason of error or mistake under s. 24 of the Finance Act, 1923.

By the said indenture of March 22, 1935, the respondent covenanted with a trustee therein named that he would, during his life, in every year pay to the trustee an annual sum (subject to deduction of income tax at the standard rate for the time being in force) equal to one-fourth part of his income as defined in clause 2 thereof. In clause 2 the expression "income" was defined as "the income of the "settlor as computed for the purpose of the Income Tax Acts, "but excluding therefrom such income as may accrue to him as "a member of an underwriting syndicate at Lloyd's, and after

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(1) The second question was not argued, the Crown admitting that if the respondent was right with regard to the first question he was entitled to relief.

"deducting therefrom all annual sums, annuities or interest "(excluding the sum payable under this deed) as are allowed "as deductions in computing total income for the purpose of "the said Acts."

On July 29, 1937, the Special Commissioners confirmed on appeal certain directions made upon Birmingham Criterions, Ld. (in liquidation), under s. 21 of the Finance Act, 1922, as extended to investment companies by s. 20 of the Finance Act, 1936, for the year ended December 31, 1935, and the period from January 1, 1936, to February 3, 1936, and apportioned the sums of 43,946*l.* and 1538*l.* out of the actual income of the company for the said periods respectively to the respondent.

An assessment to sur-tax for the year 1935–36 under s. 21, sub-s. 2, of the Finance Act, 1922, had been made upon the respondent in the name of the company in the estimated sum of 65,000*l.* This assessment was on the same day reduced by the Special Commissioners to the sum of 45,484*l.*, being the total of the two sums apportioned to the respondent as aforesaid. The said directions, apportionment and assessment were subsequently confirmed by the High Court: *Birmingham Criterions, Ld.* (*in liquidation*) v. *Inland Revenue Commissioners.* (1)

The sur-tax payable in respect of the assessment upon the respondent in the name of the company was subject to any adjustment which might become necessary as a result of any increase or reduction which might be made in the personal assessment to sur-tax upon the respondent for the year 1935–36.

The respondent had not been required by the Special Commissioners to make an amended statement of total income pursuant to para. 8 in the First Schedule to the Finance Act, 1922.

The respondent claimed that, in consequence of such assessment made upon him in the name of the company, he was liable under the said deed of March 22, 1935, to pay a sum to the trustee under that deed, amounting to 11,371*l.*, and in fact on April 15, 1938, he paid to the trustee such sum less income tax at 4*s.* 6*d.* in the £, being the standard rate of tax for the year in which the amount became due and payable.

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(1) (1938) 21 Tax Cas. 588.

There was no error or mistake in the return originally made by the respondent for the purposes of assessment to sur-tax for the reason that the additional liability to pay the sum of 11,371*l.* did not arise until the passing into law of the Finance Act of 1936, subsequent to the rendering of the return. The respondent claimed that, notwithstanding this, he was entitled to claim under s. 24 of the Finance Act, 1923, in respect of error or mistake.

The respondent contended :—

(1.) That the said sum apportioned to and assessed upon him was properly to be included in the income as defined by the deed.

(2.) That under the terms of the deed he was under a liability to pay a sum equal to a one-fourth part of that income, and that this entailed a further payment of 11,371*l.*

(3.) That there had been an error or mistake in his return rendered for purposes of sur-tax for the year 1935–36, although the error or mistake did not emerge until a subsequent date.

(4.) That he was entitled to relief under s. 24 of the Finance Act, 1923.

It was contended on behalf of the Commissioners of Inland Revenue (inter alia) :—

(1.) That income of the respondent as defined by clause 2 of the deed of March 22, 1935, did not include income apportioned to the respondent and assessed to sur-tax upon him in the name of Birmingham Criterions, Ld. (in liquidation), under s. 21 of the Finance Act, 1922.

(2.) That the said sum of 11,371*l.* was not an admissible deduction in computing the liability of the respondent to sur-tax for the year 1935–36.

(3). That there had been no error or mistake in the return or statement rendered by the respondent for the year 1935–36, and that he was accordingly not entitled to relief under s. 24 of the Finance Act, 1923, as extended to sur-tax by s. 42, sub-s. 3, of the Finance Act, 1927.

The Commissioners who heard the appeal gave their decision in the following terms:—

"In this case the appellant claims under s. 24 of the "Finance Act, 1923, repayment of sur-tax under an assessment "made upon him for the year 1935–36.

"The alleged error or mistake arose by reason of the under-"statement in his return dated June 25, 1936, of a sum "claimed to be payable by him under a deed dated March 22, "1935, and deductible for purposes of sur-tax. At the time "of rendering, the return was correct, but in the events which "subsequently happened it was claimed that it was not so.

"Under the provisions of s. 20 of the Finance Act, 1936, "extending s. 21 of the Finance Act, 1922, directions were "made by the Special Commissioners in respect of the income "of a company called Birmingham Criterions, Ld. (in "liquidation), and a part of that income was apportioned to "the appellant and subsequently assessed and charged upon "him by a further assessment in the name of the company.

"Under the before mentioned deed of March 22, 1935, the "appellant covenanted to pay to a trustee one-fourth of his "income as computed for the purposes of the Income Tax "Acts, subject to certain deductions therein specified, and he "contended that these words were apt to include the income "so apportioned and assessed upon him under the Finance "Act, 1922.

"We are of opinion that the expression 'income as com-"'puted for the purposes of the Income Tax Acts' in the "said deed operates to include income apportioned and "assessed upon the appellant under s. 21 of the Finance Act, "1922, and deemed to be his income within the meaning of "that section. The consequence is that the appellant's "liability under his covenant for the year 1935–36 is increased "by the sum of 11,371*l.*, and this sum, less tax, has in fact "been paid by him to the trustee.

"If that be the correct view, we are also of opinion that a "claim lies in this case under s. 24 of the Finance Act, 1923, "and that there has been an error or mistake within the "meaning of that section, notwithstanding that such error "or mistake did not emerge until the subsequent passing of "the Finance Act, 1936, and the direction and apportionment "made in pursuance thereof.

"The appeal therefore succeeds and we leave the figures "to be agreed between the parties."

The parties having agreed the figures, the Commissioners authorized the repayment to the respondent of the sum of 668*l*. 2*s*. 9*d*.

The representative of the Commissioners of Inland Revenue immediately after the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law, and in due course required the Commissioners to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149, and Finance Act, 1923, s. 24, sub-s. 5, which case the Commissioners stated and signed accordingly.

Sir William Jowitt S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cyril King K.C. and *F. Grant* for the respondent.

Cur. adv. vult.

1940. June 14. LAWRENCE J. read the following judgment: The question in this case is whether the respondent is entitled to deduct, under a deed of covenant of March 23, 1935, one-quarter of a sum apportioned to him under s. 21 of the Finance Act, 1922.

The question turns upon the construction of the deed of covenant, under which the respondent covenanted to pay an annual sum equal to a quarter part of his income, which was defined as follows: "The expression 'income' means the "income of the settlor as computed for the purpose of the "Income Tax Acts, but excluding therefrom such income as "may accrue to him as a member of an underwriting "syndicate at Lloyd's, and after deducting therefrom all annual "sums, annuities or interest (excluding the sum payable under "this deed) as are allowed as deductions in computing total "income for the purpose of the said Acts."

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INLAND REVENUE COMMISSIONERS v PAYTON.

Lawrence J.

For the respondent it is contended that "income" in the said deed means the total income for the purpose of the Income Tax Acts, including sums apportioned to the respondent which, by s. 21 of the Finance Act, 1922, are deemed to be his income for the purposes of assessment to sur-tax; and for the appellants that such income is not "income of the "settlor as computed for the purpose of the Income Tax "Acts," both because those words are inapt to describe such income and because the words which follow, "after deducting "therefrom all annual sums" etc. "as are allowed as "deductions in computing total income for the purpose of "the said Acts," imply that the income previously referred to is not the total income for the purpose of the Income Tax Acts; and, therefore, does not include the income in question.

Reliance is also placed for the appellants upon the case of *Leitch* v. *Emmott* (1), in which a widow's untaxed income was held to be her income, although it had in the previous year been deemed to be her husband's income under rule 16 of the General Rules.

I have come to the conclusion that the contention of the Crown is correct; and that the income of the settlor as computed for the purpose of the Income Tax Acts within the meaning of clause 2 of the covenant, does not include sums which are apportioned to him under s. 21 of the Finance Act, 1922. Such sums are not in fact his income; sur-tax thereon is assessed in the name of the company, and the words "after "deducting therefrom" in clause 2 are at least otiose, if the income of the settlor previously referred to meant his total income for the purpose of sur-tax. The appeal will therefore be allowed with costs.

Appeal allowed.

Solicitor for Crown: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Marshall & Hicks Beach.*

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(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.

R. F. S.

ROUSOU *v.* PHOTI.

GORT ESTATES COMPANY (THIRD PARTY).

C. A.
1940
April 29.

Housing—Landlord and tenant—Repair, maintenance and sanitary condition of houses—Small houses—Conditions to be implied on letting—" Rent not exceeding 40*l.*"*—Actual rent payable—No deduction for rates—Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 2, *sub-s.* 1.

Under s. 2, sub-s. 1, of the Housing Act, 1936, there must be implied in any contract to let a house or part of a house situate in the administrative county of London at a rent not exceeding 40*l.*, a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation :—

Held, that the word " rent " in the above sub-section means the actual rent contracted to be paid by the tenant to the landlord for the use of the house without any deduction therefrom of any sum in respect of rates or other outgoings which the landlord may have agreed to pay.

" Rent not exceeding 40*l.*" means a total yearly rent not exceeding 40*l.*, but the section applies to weekly tenancies and rents, as well as to rents payable over any other periods of time.

Sheffield Waterworks Co. v. *Bennett* (1873) L. R. 8 Ex. 196, and *Smith* v. *Birmingham Corporation* (1883) 11 Q. B. D. 195 distinguished.

Decision of Atkinson J. [1940] 1 K. B. 299 reversed.

APPEAL from a decision of Atkinson J., reported [1940] 1 K. B. 299, on an issue directed to be tried whether a house was or was not let at a rent not exceeding 40*l.* a year.

In July, 1937, the third party, Gort Estates Co., let to the defendant the second floor of a house in Stephen Street, London, W., at a rent of 17*s.* 6*d.* per week, inclusive of rates and taxes. In September, 1937, the defendant let one of the rooms on the second floor at 7*s.* a week to the plaintiff, who some days later complained that he was injured by part of the ceiling falling upon him. The plaintiff commenced this action against the defendant, claiming damages for injury by negligence in not discovering and remedying the unsafe condition of the ceiling. The defendant obtained leave to serve a notice on the third party, claiming to be indemnified by the third party against the plaintiff's claim, on the ground that the letting by the third party to the defendant of the second floor was a letting for habitation in the county of London at a rent not exceeding 40*l*., and that under the Housing Act, 1936, there must be implied in the contract for that letting a condition that the house was at the commencement of the tenancy in all respects reasonably fit for human habitation, and an undertaking that it would be so kept by the third party, and that if the ceiling had fallen on the plaintiff and injured him, that fall was due to a breach of the said implied condition of the tenancy.

An issue was then directed to determine whether or not the house, consisting of the said second floor, was a house let at a rent not exceeding 40*l*. within s. 2 of the Housing Act, 1936. It was admitted by the third party that if the amount of the rates properly attributable to the second floor were deducted from the sum payable by the defendant to the third party, and amounting to 45*l*. 10*s*. a year, the balance remaining would not exceed 40*l*. a year.

Atkinson J., in a considered judgment, held that the word "rent" in s. 2, sub-s. 1, of the Housing Act, 1936, meant the net rent or the annual value, a sum arrived at where the rates were paid by the landlord, by deducting the appropriate proportion of the rates levied on the whole house from the total amount of the rent actually paid by the tenant, i.e., 17*s*. 6*d*., for fifty-two weeks, or 45*l*. 10*s*. a year, and that as the net balance was less than 40*l*., the second floor was a house within the meaning of the Housing Act, 1936, and the letting was subject to the condition implied by s. 2 of the Act.

The third party appealed. The appeal was heard on April 29, 1940.

G. F. Kingham for the appellant.

"Rent" in the Housing Act means what the tenant has to pay in rent. Such a tenant who has not to pay rates, is not concerned with the amount of the rates, and therefore has not to consider net rent or annual value, i.e., the rent paid, less an apportioned sum for rates paid by the landlord. I submit that here rent means the actual money paid by the tenant to the landlord for the use of the premises which he takes: see *Mackworth* v. *Hellard*. (1)

[He was stopped by the Court.]

J. T. Molony for the respondent (the defendant).

The decision was right. The nominal rent is not the real rent at all. "Rent" in the Housing Act 1936 is not the same thing as "rent payable" the expression used in the Rent Restriction Acts. The meaning of the word "rent" taken by itself was the subject of the decisions in *Sheffield Waterworks Co.* v. *Bennett* (2) and *Smith* v. *Birmingham Corporation* (3), and in both it was held that rent meant net rent or annual value, and that the apportioned amount of the rates, where paid by the landlord, must be deducted from the rent paid by the tenant to arrive at the real rent. Those decisions apply to the present case. "Rent" must be interpreted so as not to involve inconsistencies between neighbouring houses. The question whether a house is within or without the Housing Act, 1936, should not depend on whether the rent is or is not inclusive of rates. The words "rent payable" were used advisedly in the Rent Restriction Acts so as to exclude the idea of net annual value. There should be an invariable test of value to decide whether a house falls within or without the Act, and unless the term "rent" is equivalent to annual value, no such test can be applied.

SIR WILFRID GREENE M.R. This appeal raises a short but important point on the true construction of s. 2 of the Housing Act, 1936. The section was enacted by the Legislature for the protection of persons occupying houses, or parts of houses, in comparatively modest circumstances.

The important words are these: "(1.) In any contract for "letting for human habitation a house at a rent not exceeding "(*a*) in the case of a house situate in the administrative county "of London 40*l*. . . . there shall, notwithstanding any stipula- "tion to the contrary, be implied a condition that the house is "at the commencement of the tenancy, and an undertaking that

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(1) [1921] 2 K. B. 755.

(2) L. R. 8 Ex. 196.

(3) 11 Q. B. D. 195.

"the house will be kept by the landlord during the tenancy, "in all respects reasonably fit for human habitation." By sub-s. 3: "The expression 'house' includes part of a "house."

The precise machinery by which the Legislature has given this protection to tenants of the class contemplated is the familiar one of writing into a contract an obligatory term. In order that the section may be complied with there must first of all be produced by the person claiming its protection a contract, and that contract must be of a specified character. It must be a contract for letting; it must be a contract for letting for human habitation; and it must be a contract for letting at a rent not exceeding the sum stated. When such a contract is produced the section provides that in it there must be deemed to be included the condition and undertaking with regard to the repair of the premises. If no such contract is produced, or if the contract produced is not of that character, the condition and the undertaking are not written in.

In the present case the contract between the appellants, the third party in the action, and the defendant was a verbal contract to let at 17*s.* 6*d.* a week the second floor, which I think consists of two rooms, of No. 27, Stephen Street, Tottenham Court Road. There was no written contract, but there was the usual rent book, in which the payments were entered as they were made. It appears that the defendant has been in these rooms for some three years, paying a rent of 17*s.* 6*d.*

The first question which arises is whether the contract so produced by the defendant is a contract of the kind specified in the section. The only matter of doubt which arises at the outset lies in the circumstance that, the letting being a weekly letting, the rent is a weekly rent. Accordingly, one does not find in the contract a rent of 40*l.* a year so expressed.

It might be argued (and Mr. Kingham quite rightly did not give up the point) that the section does not apply at all to houses which are let at something other than an annual rent. The learned judge did not accept that view, and I can see difficulties in the way of taking that view. If it were accepted, the section would fail to give protection to a vast number of persons for whom its protection was eminently desirable. As at present advised I see no reason to differ from the view taken by the learned judge on that point, but, having regard to the fact that we have not had it fully argued, I do not propose to do more than to assume (because it is an assumption), in favour of the defendant, that his contract is one to which the section is capable of applying notwithstanding the fact that it is a weekly tenancy and the rent is a weekly rent.

The defendant, having got so far, must now satisfy the provisions of the section in the matter of quantum. He must show that his rent does not exceed 40*l.* The rate of his rent, translated into terms of a yearly rent, would be 45*l.* 10*s.* It seems to me, in the first instance at any rate, that this is the proper sum which the contract should be deemed to provide by way of rent. I say " in the first instance," because there is a point about it which I shall have to mention later.

It is said by the defendant that, though 45*l.* 10*s.* is the contractual rent, nevertheless it is not the rent within the meaning of the section, because there should be deducted from it a sum in respect of rates. For the purposes of argument it was agreed below that, if any such deduction ought properly to be made for the purposes of the section, the sum of at least 5*l.* 10*s.* ought to be deducted. The result of that would be, if the defendant's argument were right, to make the section applicable to the case.

Atkinson J. took the view that the word " rent " in the section does not mean what it says, namely rent, but annual value. Accordingly, he held that, where a tenant pays what is sometimes called an inclusive rent—that is to say, paying rent and leaving the landlord to bear the rates—the sum paid by the tenant is not to be the test, but some other sum to be ascertained by deduction from that of whatever is the fair and just apportionment in respect of rates for the part of the premises which he occupies, if he has indeed occupied only part.

With all respect to the learned judge, I cannot accept the view which he took of the construction of the section. The section requires the existence of a contract. The rent referred to in the section appears to me to mean, and to mean only,

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the rent payable by virtue of that contract by the tenant to the landlord. I can see no justification for dissecting that contractual payment and attributing part of it to something which is called the annual value of the house, or of part of the house, and attributing the rest of it to rates or an apportioned sum in respect of rates. It seems to me that the Legislature has taken, for reasons no doubt thought good by it, a simple and clear test about which nobody could be confused, namely, the actual contractual rent paid by the tenant to the landlord.

It is said, and said with some force, that that may lead to anomalies. One may find cases of lettings where the landlord pays the rates, and cases of lettings where the landlord does not pay the rates. If the true view is that this section applies to weekly tenancies (of which there are an enormous number all over the country) not merely of houses, but of parts of houses, it appears to me to be quite incredible that the Legislature should have laid down a test in terms with regard to contractual rent which can only be applied after what may be an elaborate and difficult process has been gone through, of estimating what is the proper proportion of the rates to be attributed to one room, or to two rooms, or to three rooms, or to three rooms and the use of a bath room, or in all the various complications which one could get. The test adopted by the Legislature has the advantage of being a simple one, and, in my opinion, that is what the section means.

The learned judge relied on two cases, the principal one being *Sheffield Waterworks Company* v. *Bennett* (1) in the Court of Exchequer, the other being *Smith* v. *Birmingham Corporation*. (2) Both cases involved the construction of a section dealing with a water-rate. In *Sheffield Waterworks Company* v. *Bennett* (1) the water-rate fell on every occupied house, whether occupied by a freeholder or by a leaseholder. The quantum of rate was to be fixed in accordance with the relevant section of the company's private act, "at the following "rate per annum, that is to say, where the rent of such "dwelling-house or part of a dwelling-house shall not amount "to 7*l*. per annum, at a rate not exceeding 6 per centum per

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(1) (1872) L. R. 7 Ex. 409.

(2) 11 Q. B. D. 195.

"annum on such rent," and so on. It is to be observed that in that case, as in the later case of *Smith* v. *Birmingham Corporation* (1) there is no reference in the section at all to any contract between the parties. In other words, the rent referred to is not, so far as language goes, necessarily something which is fixed by contract, because the statute does not direct one in terms to look at the contract between landlord and tenant, and for this very good reason. In the case of water-rate payable by a freeholder, as by a leaseholder, if one had to refer to a contract between landlord and tenant, the freeholder would pay no water-rate at all. Accordingly, it was held in *Sheffield Waterworks Company* v. *Bennett* (2), and in *Smith* v. *Birmingham Corporation* (1), that it was possible there to construe "rent" as meaning "annual value." It was a decision which was easier to come to in those cases—although even in those cases it was recognized as difficult by virtue of the circumstance that I have mentioned—namely, that to construe "rent" as meaning the contractual rent payable under a lease or tenancy would have left the freeholder out altogether. On balance, the Courts, on the scope and intention and construction of those particular Acts, succeeded in construing the sections in that way.

The present case, if I may say so with all respect to the learned judge, is an example of the danger of construing words in one context in one Act of Parliament directed to one particular object by reference to decisions on different words in different Acts of Parliament directed to different objects. My respectful criticism of the learned judge's approach to this question is that, instead of going to the language of the section and analysing it, and construing it, he allowed his mind to be affected by those earlier authorities, which, as I have said, are dealing with quite a different matter, expressed in quite different language. I do not find any embarrassment in those authorities such as would prevent me taking the view which I take. Accordingly, in my opinion, "rent" in this section means contractual rent, and no deduction falls to be made, in respect of rates and taxes, or anything else.

That still leaves one point. It is said that, on the assumption

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(1) 11 Q. B. D. 195.

(2) L. R. 7 Ex. 409.

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that the section applies to weekly tenancies, it is not proper to take the weekly rent and multiply it by fifty-two, because to translate a weekly rent into the terms of an annual rent you must allow for periods during which the house or part of the house may stand empty without any tenant. So far as the present case is concerned, it is not necessary to answer that particular question, for the simple reason that, if that argument be right, and if a different multiplier ought to be applied, it is for the defendant to show what the proper multiplier is. I say that for this reason. The person relying on the section must come to the Court with a contract in his hand (figuratively speaking, if it is not a written contract) at a rent of the amount specified. If, therefore, his contract is at a weekly rent, and if he says that you must multiply that by something less than fifty-two, it is for him to show what the true annual rent is, having regard to the sum paid a week. What that might be might vary in different neighbourhoods and in different streets, and would be a matter for evidence.

Accordingly, it is sufficient to say in the present case that, in the absence of any evidence whatever which would justify taking some figure other than fifty-two as the multiplier, the Court would not be justified, in my opinion, in drawing any inferences, or proceeding on any assumptions. Accordingly, it is sufficient to say here that the defendant has not brought himself within the language of the section.

I purposely do not express any view whether or not there be something in the contention that, given proper proof of the facts, some multiplier other than fifty-two in certain cases might be taken. I should prefer to leave that open as it has not been fully argued before us. It has only been argued on one side. It would not, therefore, be proper to express any opinion about it. In the present case it is enough to say that, even assuming that that be right, the present respondent does not obtain any advantage from it.

In the result, the appeal must be allowed and the order of the learned judge must be varied accordingly.

Scott L.J. I agree entirely, and would only add that if a case should arise where the conversion of a weekly rent into an annual figure becomes relevant, the analogy of rating practice —explained, for example, in Ryde on Rating, 6th ed., p. 108— would probably be in point.

MACKINNON L.J. I agree, and I do not think that I need add anything.

Appeal allowed.

Solicitors: *Walfords; Leonard Kasler.*

H. L. L.

C. A.
1940
June 6, 7, 10, 11, 12, 13.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, AND ANOTHER *v.* MIDLAND BANK, LIMITED, AND OTHERS.

[1938. G. 1996.]

Insurance (Fire)—Policies insuring three insured "for the respective "rights and interests"—Not joint insurance policies—Fire claim by one of insured—Payment by cheque in favour of the three insured —Endorsement by all and payment into account of claimant— Fraudulently excessive claim by claimant—Action to recover sum paid —No right to recover against the insured other than the claimant.

By a policy of insurance of an insurance corporation, which had been renewed to run for a year from March 25, 1936, the plant and stock of P. B., Ld. (called "the company"), and the buildings containing the stock and plant were insured against loss or damage by fire up to twenty per cent. of their value in favour of the company, the Midland Bank, Ld., and S. & W., Ld., for their respective rights and interests. Under condition 5 of the policy all benefits under the policy were to be forfeited if a claim was in any respect fraudulent. The other eighty per cent. of the value of the same properties was insured by Lloyd's underwriters under a policy to which the same condition applied. On March 14, 1937, a fire occurred on the premises and claims were put in by the company in respect of the stock and plant and certain of the buildings. These claims were paid by the corporation, and as regards the Lloyd's policy by Lloyd's brokers, who were agents of the insured and were recouped by the underwriters. In each case payment was made by cheques in favour of the three insured and endorsed by them to enable the company to have the benefit of them. The stock and plant belonged only to the company, but the buildings affected by the fire belonged to S. & W., Ld., as freeholders, the company being only tenants at will. The Midland Bank, Ld., held debentures of the company to secure an overdraft in respect of which they had a floating charge on the company's assets and S. & W., Ld., were guarantors of the overdraft :—

Held, (1.) that there could only be a joint insurance policy in respect of joint interests and that in view of the diverse interests of the three insured, the two policies must be composite policies insuring the three insured for their respective rights and interests ;

(2.) that, in any case, on the true construction of these policies they were not joint insurance policies ; and

(3.) that, therefore, although payment was made by cheques in favour of the three insured jointly and endorsed by them, the payments were not recoverable from S. & W., Ld., and the Bank. So far as the stock and plant were concerned the company were alone interested, and even if, as regards the buildings,

S. & W., Ld., could be treated as interested under the claim put in by the company, the claim in respect of the buildings was a perfectly proper one and as far as S. & W., Ld., were concerned entirely untainted by any fraud.

Decision of Tucker J. affirmed.

APPEAL from Tucker J.

By a policy of insurance dated March 25, 1935 (afterwards renewed for a further year on March 25, 1936), and made by the General Accident Fire and Life Assurance Corporation, Ld. (hereinafter called " the corporation "), with the defendants, Plant Brothers, Ld. (hereinafter called " the company "), who were manufacturers and dealers in domestic and garden requisites, Colonel S. A. Medcalf, Mr. A. H. Maxwell and Mr. James Neilson and the Midland Bank, Ld. (Enfield Branch), the property described in the specification annexed to the policy and consisting of certain buildings at Cambridge Arterial Road, Enfield, in use by the company for the purpose of their business, and the plant and stock in trade, including various materials and goods manufactured or in course of manufacture in these buildings, were insured against destruction or damage by fire for twenty per cent. of their total value of 55,250*l.*, as set out in the specification, for the respective interests of the insured. The printed part of the policy was in a form applicable to a single insured person.

Condition 4 of the printed conditions provided : " On the "happening of any destruction or damage the insured shall "forthwith give notice thereof in writing to the corporation "and shall within 30 days after such destruction or damage, "or such further time as the corporation may in writing "allow, at his own expense deliver to the corporation a claim "in writing containing as particular an account as may be "reasonably practicable of the several articles or portions of "property destroyed or damaged and of the amount of "destruction or damage thereto respectively, having regard to "their value at the time of destruction or damage, together with "any details of any other insurance on any property hereby "insured . . . . No claim under this policy shall be payable "unless the terms of this condition have been complied with."

Condition 5 provided: "If the claim be in any respect "fraudulent or if any fraudulent means or devices be used "by the insured or anyone acting on his behalf to obtain "any benefit under this policy or if any destruction or "damage be occasioned by the wilful act or with the connivance of the insured all benefit under this policy shall "be forfeited." Of the total sum of 55,250*l.*, 15,250*l.* was attributed to the buildings and 40,000*l.* to the plant and stock in trade.

On October 20, 1936, the policy was endorsed as follows: "The interest in the insurance by this policy is now vested "in Messrs. Plant Brothers, Ld., ... Messrs. Scoffin and "Willmott, Ld., of Barking Bypass Road, Barking, Essex, and "the Midland Bank, Ld., of Ilford, Essex, for their respective "rights and interests." The position then was that on October 6, 1936, Scoffin and Willmott, Ld., had acquired for an estate in fee simple certain of the buildings occupied by the company as tenants at will from the previous owners, Colonel Medcalf, Mr. Maxwell and Mr. James Neilson, and had in the same month acquired the whole of the issued share capital of the company.

There was a further policy taken out with a number of Lloyd's underwriters, including the plaintiff Matthew Watt Drysdale, and dated May 25, 1936, and covering the period from March 25, 1936, to March 25, 1937, for the purpose of covering the remaining eighty per cent. of the same risk and with the same original insurers for their respective rights and interests. It was made subject to the same terms and conditions as the above mentioned policy, and it is expressly provided: "If the assured shall make any claim knowing "the same to be false or fraudulent as regards amount or "otherwise this policy shall become void and all claims "thereunder shall be forfeited." There was an endorsement on the policy dated October 22, 1936, which provided: "Notwithstanding anything contained herein "to the contrary it is hereby noted and agreed that the "interest in the within policy is now vested in Messrs. Plant "Brothers, Ld., ... Messrs. Scoffin and Willmott, Ld.,

". . . . and the Midland Bank, Ld., of Ilford, Essex, for "their respective rights and interests."

On March 14, 1937, a fire occurred on the insured premises doing damage to some of the buildings and the contents. On March 15, 1937, Mr. James Neilson, who besides being an agent of the corporation was a director of the company and of the defendants Scoffin and Willmott, Ld., gave notice of the fire to the corporation. The letter was headed by the numbers of the fire policies and the words "Plant Bros., Ld." Lloyd's policy contained a provision that it was to follow the settlements of the corporation, and a firm was appointed to investigate the fire and assess the claims. The claim in respect of the buildings was ultimately agreed at 5046*l.*, of which 1009*l.* 7*s.* 4*d.* was payable by the corporation and 4037*l.* 9*s.* 2*d.* by the Lloyd's underwriters. That settlement was agreed to between the company and the corporation and Lloyd's underwriters. The claim in respect of the contents of the buildings was later agreed at 25,425*l.* 10*s.*, of which 5085*l.* 2*s.* was payable by the corporation and 20,340*l.* 8*s.* by Lloyd's underwriters. These sums were paid by four cheques, two of which were drawn by the corporation and two by Messrs. Woods and Maslen, a firm of Lloyd's brokers. They were all drawn in favour of the company, Scoffin and Willmott, Ld., and the Midland Bank. The corporation sent their cheques to Mr. H. R. Neilson, a relative of Mr. James Neilson, and the first cheque for 1009*l.* 7*s.* 4*d.* was accompanied by a letter dated May 4, 1937, and headed "Plant Brothers, Ld.," in which it was said: "You will, no doubt, be seeing the "agent soon and we should be glad if you will hand the "cheque to him and also have the enclosed discharge form "completed and return it to us." This receipt form was signed on behalf of the company. The same course was adopted by the corporation when sending their second cheque for 5085*l.* 2*s.* and an identical form of receipt was duly completed by the company. The amounts due from the underwriters were sent to Mr. James Neilson by Messrs. Woods and Maslen after they had received from the company the Lloyd's policy endorsed with the words "Pay all claims to Woods and

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"Maslen." They were accompanied by letters headed "Re "Plant Brothers." The first payments by Messrs. Woods and Maslen were made before they received any payment from the underwriters. The four cheques were all endorsed by the three insured and paid into the company's account at the Midland Bank (Ilford Branch). The company at all material times had an overdraft with the Midland Bank up to 20,000*l.* secured by four debentures of the company for 5000*l.* each and guaranteed by Scoffin and Willmott, Ld. The result of the payment in of these cheques was to convert the overdraft into a credit of 7424*l.*, but the account rapidly went into debit again.

It was subsequently discovered that the fire had been caused by the deliberate act of an employee of the company, but the company was not shown to have been aware of this. The company, however, put in a fraudulently excessive claim in respect of the stock and plant, and on September 23, 1938, the plaintiffs commenced these proceedings against all the insured to recover the total sum of 6094*l.* paid by the corporation and the sum of 26*l.* 5*s.* 9*d.* paid by the plaintiff Drysdale as one of the Lloyd's underwriters. It was admitted by the defendants in the action that one Haynes had deliberately set the insured premises on fire and caused the loss, and that the claim made by the company in respect of the plant and stock was fraudulently exaggerated. The company, which had gone into liquidation, did not appear in the action. The defendants, the Midland Bank and Scoffin and Willmott, Ld., resisted the plaintiffs' claim on the ground (amongst others) that they had never received any part of the money; that the only claim made against the insurers was by the company, and that they endorsed the cheques as a matter of form in order to enable the company to be paid.

Tucker J. said he was satisfied that the claims made to the corporation and to Lloyd's underwriters were made by the company only and that the company never made or purported to make a claim on behalf of the Midland Bank or Scoffin and Willmott, Ld. He further held that under these policies the insurers insured the insured for their respective rights and interests as was in fact stated in the policies, and that when the loss occurred their respective rights and interests might have varied greatly. The only insurable interest of the Midland Bank was in respect of the 20,000*l.* worth of debentures, and circumstances had never arisen which entitled them to enforce their security. The insurable interest of Scoffin and Willmott, Ld., was limited to their interest in the part of the buildings of which they were freeholders. That being the position the only claim made was by the company, and there was not a document to indicate that the other insured were consulted from beginning to end in respect of the claims. The actual claims put in were signed for the company by a director. How the cheques in payment came to be made out in favour of the three insured was a matter of speculation or perhaps inference. In his view, whatever the reason was, neither the Midland Bank nor Scoffin and Willmott, Ld., had received any money from the plaintiffs ; and they endorsed the cheques sent merely as a matter of machinery to enable the company to obtain payment of their claim. Neither of them received the proceeds of these cheques. It was true that they might have received some ultimate benefit as the result of the company being put in a better position to discharge their indebtedness, but the same was the position of any other creditor of the company. An action for money had and received would lie if a person had received a cheque as the equivalent of money and as payment, even if the proceeds had not been ultimately credited to him. That was not what had happened in this case. The endorsements were made as a pure matter of machinery to enable the company to get the money which they had claimed and the mere endorsement was not sufficient ; it was necessary to show that the cheques were delivered to and received by the bank and Scoffin and Willmott, Ld., as the equivalent of money and that had not been done.

A further defence had been put forward with regard to the cheques paid by Messrs. Woods and Maslen. The defendants said that Woods and Maslen, being Lloyd's brokers, were not agents for the underwriters but for the company.

The Lloyd's policy was endorsed on April 29, 1937, by the company in these terms: "Pay all claims to Woods and "Maslen." By so doing the company, who had made the only claims, constituted Woods and Maslen their agents to receive the money. The claims were paid by Woods and Maslen who were recouped by the underwriters, but the bank and Scoffin and Willmott, Ld., contended that Woods and Maslen were never their agents, and that the underwriters fulfilled all their obligations when they paid Woods and Maslen, with the result that their remedy was against Woods and Maslen or against Woods and Maslen's principals, the company, in respect of any money Woods and Maslen had passed on to their principals. That also was a good defence in regard to eighty per cent. of the claim. There must be judgment for the Midland Bank and Scoffin and Willmott, Ld.

The plaintiffs appealed. The appeal was heard on June 6, 7, 10, 11, 12 and 13, 1940.

A. T. Miller K.C., *H. D. Samuels K.C.* and *Cyril T. Miller* for the appellants. The cheques were paid to the three insured jointly and endorsed by them and they must be taken to have received the money jointly. The fact that they were paid into the company's account makes no difference and in fact this enured for the benefit of the bank by discharging the company's overdraft and putting the account in credit. Further, a substantial part of that credit was paid to Scoffin and Willmott, Ld., in discharging an indebtedness of the company. The position, therefore, is that the insured were joint receivers of the money, that followed from all endorsing the cheques, and it was really immaterial how the amount of the cheques was then dealt with. The company dealt with the cheques by the authority of the other two payees.

As regards the cheques paid by the Lloyd's brokers they were acting on behalf of the underwriters in making the payments. The payments under the Lloyd's policy therefore stand on the same footing as the payments by the corporation. The endorsement by the three makes a prima facie case that payment has been made to all three. An insurance company cannot make inquiries as to the interests of each of three joint insurers. It can only pay by cheque in favour of them all.

There is no ground for regarding the Lloyd's underwriters as being in a different position from the corporation, although they paid the three insured through Woods and Maslen. In making the payment Woods and Maslen were not acting as agents for the insured but as agents for the underwriters.

[Sir Wilfrid Greene M.R. If the brokers paid as agents for the insured they would be obtaining payment from the underwriters as assignees of the policy.]

They were acting as the underwriters' agents and the endorsement of the policy in their favour was not obtained to enable them to get paid by the underwriters. It was obtained in pursuance of the ordinary course of business and as part of the usual machinery. The brokers paid on the authority of the underwriters on a settlement which they had authorized. An alternative view that has the same result is that Woods and Maslen acted as agents for the insured to collect the policy money and paid the insured in advance.

On either view the underwriters are in a position indistinguishable from that of the corporation and the cheques endorsed by the three insured, and honoured, constitute payment to them all three: see *Felix Hadley & Co.* v. *Hadley* (1); Byles on Bills, 20th ed., p. 23; *Egg* v. *Barnett* (2), *Currie* v. *Misa* (3); *Hine Brothers* v. *Steamship Insurance Syndicate, Ld.* (4) There is no authority directly in point, but these cases help to support this contention.

[They also referred to *Scottish Metropolitan Assurance Co.* v. *P. Samuel & Co.* (5)]

John W. Morris K.C. and *H. G. Robertson* for the bank. The case which the appellants sought to establish may be analysed in the following style. They say—

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(1) [1898] 2 Ch. 680.
(2) (1800) 3 Esp. 196.
(3) (1875) L. R. 10 Ex. 153.
(4) [1895] 72 L. T. 79.
(5) [1923] 1 K. B. 348.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LD. *v.* MIDLAND BANK, LD.

(1.) That the insurance moneys were received by all the defendants, including the bank, and paid to them by the plaintiffs.

(2.) That the moneys were paid because they mistakenly believed the claims to be honest.

(3.) That the claims were not honest and that because of this the moneys are repayable.

On the whole case the following points are taken for the bank: (1.) that the money was not paid to the bank by the plaintiffs; (2.) that if the money was paid to the bank they have paid it over to the company and are no longer liable; (3.) further, that if the money was paid to the bank, it was not paid by the plaintiffs by reason of a mistake making it recoverable; (4.) that the plaintiffs are estopped from recovery from the bank; and (5.) that s. 82 of the Bills of Exchange Act, 1882, applies unless the payment to the bank was from someone other than a customer.

The policies in these cases were with the three insured "for "their respective rights and interests." They are therefore not joint policies but effect a separate insurance of the rights and interests of each insured person. If this was not so, the misdeed of one insured would prevent the others recovering: see *P. Samuel & Co., Ld.* v. *Dumas* (1), which recognized that in the case of a policy of insurance by a mortgagor and mortgagee of a ship, the fact that the mortgagor had scuttled the ship would not have prevented the mortgagee recovering if the loss of the ship had been due to a peril of the sea. That is on the ground that the mortgagee was an original insurer. There the interests of the mortgagor and mortgagee were intermingled, but the present is a stronger case as the interest of each of the insured is entirely distinct. In such a case it is absurd to talk of a joint policy. Further, the only claims made on the corporation and the underwriters under these policies were made by the company. That is clear from the evidence. That being so, the cheques in payment of the claim ought to have been made out in favour of the company only.

(1) [1924] A. C. 431.

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[Sir Wilfrid Greene M.R. Was not the business position so far as the buildings were concerned, that Scoffin and Willmott, Ld., allowed the company to make the claims because they controlled the company ?]

The company in fact rebuilt the damaged premises. So far as the bank is concerned, it had only a floating charge on the buildings and the stock and plant, and had the company failed to put in a claim it would have reduced the value of the floating charge ; but the bank had no claim under the policy. There were separate insurances here just as there are in the cases of insurance by lessor and lessee or by mortgagor and mortgagee.

Where two or more people, whose interests are different, enter into a contract of insurance there are two or more contracts. They have not a joint interest and therefore they cannot have a joint risk or a joint loss. The words in the policy "for their separate rights and interests" make this case a stronger one than *P. Samuel & Co., Ld.* v. *Dumas.* (1)

The moneys were not paid to the bank by the appellants. The company might just as well have paid the policy-money into another bank and then there would have been no possible ground for saying the bank received any part of the policy-money. The company were the only insurers that could claim in respect of the stock. The appellants, when they wanted a receipt for their payment, got it from the company. The appellants could easily have found out the interests of each of the parties.

[They referred to *Kelly* v. *Solari.* (2)]

H. U. Willink K.C. and *G. Granville Sharp* (for *W. L. McNair*, on war service), for Scoffin and Willmott, Ld. The question here is whether there was a joint payment to the three parties, and that is purely a question of fact. The word "property" in an insurance policy does not mean the property as a whole, but the interest of the insured in the property : see per Jessell M.R. in *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.* (3)

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(1) [1924] A. C. 431.

(2) (1841) 9 M. & W. 54, 58.

(3) (1877) 5 Ch. D. 569, 576–7.

In *P. Samuel & Co., Ld.* v. *Dumas* (1) it was never suggested that the mortgagor and the mortgagee were jointly insured and it is legally impossible to have a joint insurance of three persons with different interests. In the case of an insurance contract, each person insured must have an insurable interest. An insurance cannot be made jointly in respect of a collection of insurable interests. Here there was no joint insurable interest to justify a joint insurance policy: see in this connection the Marine Insurance Act, 1906, ss. 5 and 14, and Macgillivray on Insurance, 2nd ed., p. 199. The position as regards the stock and plant is that they belonged to the company and the bank's only interest in them was by way of a floating charge while it is only as guarantors of the overdraft with the bank that Scoffin and Willmott, Ld., might have become entitled to the benefit of the floating charge, and then only if they were called upon to pay on their guarantee. It is true that Scoffin and Willmott, Ld., were owners of the freehold of three of the buildings and the company tenants at will and in respect of those buildings the company put in an excessive claim, as they claimed the entire loss on the buildings with a view to rebuilding them. These various interests are not a possible subject-matter of a joint policy. The conditions of the policy support the view that this is not a joint policy and the words providing that the insurance shall be of the three insured "for their respective rights and interests" put this beyond doubt.

Further the only claim was made by the company and there is not a single document to suggest that the company was acting as agents for either of the other insured. The cheques drawn in favour of the three insured were therefore not payment to three. They were received by them as bills of exchange to be delivered over to the company. The payment was to the company alone. These contentions apply to both the policies. As regards the Lloyd's policy the evidence shows that Woods and Maslen were acting as agents for the company and that when once a claim has been accepted by the underwriters the agents are free either to settle the claim at once or to wait for payment by the underwriters. The payment by the brokers was not a payment on behalf of the underwriters.

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(1) [1923] 1 K. B. 592; [1924] A. C. 431.

Returning to the general question, if payment was made to the three insured on the view that the policy was a joint policy, that was a payment in mistake of law and not of fact. [They referred to *Kelly* v. *Solari* (1) and *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2)]

A. T. Miller K.C. in reply. The respondents' arguments have been directed mainly to the questions (1.) whether the policy was on its construction a joint policy; and (2.) whether the claim in respect of the fire was made by the company alone. But the vital questions here are (1.) did the insurers make their payments to the three insured? and (2.) was the payment made in mistake of fact? Here the policy was on its true construction a joint policy. The insurers were insuring property for the three insured without any knowledge of their particular interests. The persons who together had a hundred per cent. interest in the property insured could take out a joint insurance policy and that on the true construction of the policies in this case was what was done. The further question whether the claim was by the company alone depends largely on whether the policy is a joint insurance policy. If it is, the claim must be treated as a claim for all.

Even if the Court were against the appellants on these two points, the fact still remains that payment was made to all three insured. The cheques were made out to the three of them jointly and were endorsed by them all. It is immaterial what happened to the cheques subsequently, provided that they were honoured.

[He referred to *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2), and *Kelly* v. *Solari* (1) and *Baylis* v. *Bishop of London.* (3)]

SIR WILFRID GREENE M.R. The appellants, who were the plaintiffs in the action, are the General Accident Fire and Life Assurance Corporation, Ld., and Mr. Matthew Watt Drysdale, one of a number of Lloyd's underwriters who underwrote the Lloyd's policy here in question. The appeal is from a judgment of Tucker J. dismissing the action as against the first two defendants, Midland Bank, Ld., and Scoffin and Willmott, Ld. The third defendants, Plant Brothers, Ld., who are in liquidation, did not appear in the action.

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(1) 9 M. & W. 54.

(2) [1926] A. C. 670.

(3) [1913] 1 Ch. 127.

I shall not attempt to set out the facts which are relevant to the present inquiry. They are sufficiently stated in the judgment of the learned judge, and all that I need do is to refer to one or two matters which have a special reference to the reasoning on which I consider that this case ought to be decided.

At the date when the two policies became effective the persons named as the insured in the policies were interested in different ways. Plant Brothers, Ld., were carrying on their business on certain premises, part of which they owned themselves, and part of which they occupied as tenants at will of Scoffin and Willmott, Ld., who were the freeholders of that part. That was the part which was damaged by the fire. On those premises Plant Brothers, Ld., had certain stock belonging to them.

Midland Bank, Ld., who were the bankers of Plant Brothers, Ld., were creditors on a current account for an overdraft, which fluctuated from time to time, which they had granted to Plant Brothers, Ld. The limit was 20,000*l.*, a limit which on occasions was, as not infrequently happens, slightly exceeded. As security for that overdraft the bank held four debentures. Each of those debentures was by way of floating charge alone. There was no fixed charge in them, and at the relevant time the debentures remained a floating security and had not yet crystallized. The position, therefore, of the Midland Bank was that their interest in the property, both buildings and stock, which was the subject-matter of the insurance, was that of a holder of a floating charge. As the result of that situation, when the stock was destroyed, and the buildings were damaged by fire, the property subject to the floating charge had to that extent disappeared or depreciated, and its place was taken by the claim which Plant Brothers, Ld., had against the underwriters. That is the nature of a floating charge. It floats over and comprises all the property, whatsoever it may be at any given moment, of the person giving the charge. If one piece of property is replaced by another piece of property, the first piece of property drops out, and the new piece of property comes in.

Scoffin and Willmott, Ld., besides being interested as freeholders of part of the premises of Plant Brothers, Ld., also had another interest. They had guaranteed the debt of Plant Brothers, Ld., to the bank. That by itself would not have given them an insurable interest in the property of Plant Brothers, Ld., but one result of their giving a guarantee was that, if and when they came to be called on to implement it, they would be entitled to take over from the bank the security which the bank held, and in that sense they had a contingent interest in the stock which was covered by the insurance.

Those, therefore, were the interests of the various parties named in the policies. They were interests of a differing character, and they were interests in respect of which not all the parties were in anything like the same situation. For example, Scoffin and Willmott, Ld., had a special interest in part of the buildings in their character as freeholders. That was a character which they did not share with the Midland Bank, Ld., who had no such interest, or with Plant Brothers, Ld., who were only the tenants at will of those premises. Scoffin and Willmott, Ld., also stood in another relationship to Plant Brothers, Ld., which gave them what might be called a business interest in the assets of Plant Brothers, Ld., but that interest was not one, as is conceded, which would amount to an insurable interest. It was their interests as the holders, if not of all the shares, at any rate of the controlling interest in the share capital of Plant Brothers, Ld.

Those being the different interests of the parties, these insurances come into force, and the first question, and to my mind, the crucial question in this case depends on the true construction of the policies. I need only refer to one of them, the General Accident policy, which is the leading policy.

Such variations from its form as are to be found in the Lloyd's policy do not, in my judgment, affect the substantial question of construction, since both, in my opinion, have the same effect and meaning.

The first matter in the General Accident policy which calls for notice is that it is on a printed form, with typewritten additions. Both the body of the policy and the printed conditions are quite clearly drafted with a view to an insurance in favour of one individual insured. It is only when the typewritten conditions are examined that it is found that there are not one named insured, but three. Most of the difficulties in the case have arisen from the circumstance so frequently found, that a printed form has been used for a purpose for which it was not intended, and the alterations which that purpose required in order to avoid ambiguity were not made. Accordingly, we have to construe the document as best we can, always remembering that in such a case the printed form may yield to the added matter—be it typewritten or handwritten, or whatever it may be—if it is necessary that it should do so for the purpose of arriving at a reasonable and consistent construction of the document as a whole.

The policy starts in these terms: "In consideration of "the insured named in the schedule hereto paying to the "General Accident Fire and Life Assurance Corporation, Ld. "(hereinafter called the 'corporation'), the first premium "mentioned in the said schedule, the corporation agrees." When the schedule is examined to find out the name of the insured these two matters appear. First, in the body of the schedule as originally drawn there appears the following statement—I omit addresses and descriptions: "The insured: "Messrs. Plant Brothers, Ld., Colonel S. A. Medcalf, A. H. "Maxwell, Esq., and James Neilson, Esq., and the Midland "Bank, Ld., of Enfield, Middlesex, for their respective "rights and interests." The policy when first taken out was taken out in those names, the three named men being at that time the owners of the freehold property subsequently acquired by Scoffin and Willmott, Ld. Next, there comes an endorsement dated October 20, 1936, which became necessary by reason of Scoffin and Willmott's acquisition of the freehold, as the result of which the three named men ceased to have any interest in any of the property covered by the insurance. The endorsement of October 20, 1936, again omitting addresses and so forth, is as follows: "The interest in the insurance "by this policy is now vested in Messrs. Plant Brothers, Ld., "Messrs. Scoffin and Willmott, Ld. and the Midland Bank, "Ld., of Ilford, Essex, for their respective rights and "interests." The Ilford branch appears because in the meanwhile the main account of Plant Brothers, Ld., had apparently been transferred there, or, at any rate, that was the branch which was brought into the picture in place of the Enfield branch, because Scoffin and Willmott, Ld., had their account there; but that is of no importance. The phrase, "the "interest in the insurance by this policy is now vested," is, of course, a loose expression. The legal position which it is intended to declare appears to me to be more accurately stated by saying that the persons whom the underwriters now undertake to indemnify by this document are those three named persons "for their respective rights and interests." When it is said that the interest in a policy is now vested in so-and-so, all it means is that so-and-so is the person whom the underwriter contracts to indemnify.

The next matter in the policy which requires attention is the undertaking for payment by the corporation. In the event of the property insured being destroyed or damaged by fire, the premium having been paid, the corporation undertakes to "pay to the insured the value of the property "at the time of the happening of its destruction or the amount "of such damage or at its option reinstate or replace such "property or any part thereof," and there is a limit of liability to the sums specified in the schedule.

Then come the printed conditions. I shall have to refer to one or two of them and will not read them now.

Turning again to the schedule, it is found that the property insured falls into two categories: buildings in respect of which a limit is stated; and "stock in trade, including raw "materials, goods manufactured or in course of manufacture, "the property of the insured or held by them in trust or on "commission for which they are responsible whilst in said "buildings," with certain exceptions, "or in the open yards "near," and there is a limit under that head of 40,000*l*. In respect of both those two items there is the further limit in this policy that the corporation only undertakes twenty per cent. of the risk, the remaining eighty per cent. being taken by Lloyd's underwriters under the Lloyd's policy.

In respect of the stock there is the common provision for periodical declarations, with the consequential necessity for adjustments in the premium. Those adjustments might involve repayments by the corporation, or they might involve additional payments by the insured. There is a clause providing for that, by which the insured undertakes to make the declarations, and on expiry of the period of insurance to pay the balance, if any, of the premium due on the average of the declarations. There are various undertakings by the insured, many of them of a detailed nature, as, for instance, matters with regard to fire precautions on the premises.

That being the general character of the document, it is argued by the appellants that the insurance effected by it and also, of course, by the Lloyd's policy, with which I am not troubling myself, is that described as a joint insurance. Mr. Miller, while maintaining that argument, claimed that it was not essential to the success of his case. I myself think that the success of that argument is essential to his case for reasons which will later appear.

I will now address myself to a brief consideration of that argument, which is affected by two considerations. The first is the true meaning and effect of the document itself, which is claimed to have such a result, and the other question is whether a joint insurance—using that phrase in any accurate sense—can exist in a case such as the present, where the interests of the parties are not joint in any sense. That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property—and I use that phrase in the strict sense—an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combining in one insurance a number of persons having different interests in the subject-matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case the interest of each of the insured is different. The amount of his loss, if the subject-matter of the insurance is destroyed or damaged, depends on the nature of his interest, and the covenant of indemnity which the policy gives must, in such a case, necessarily operate as a covenant to indemnify in respect of each individual different loss which the various persons named may suffer. In such a case there is no joint element at all.

Applying those considerations to the facts of the present case, there is no joint loss to the bank and to Scoffin and Willmott, Ld., in respect of the damage by fire to the premises. The bank, in truth, having only a floating charge, suffered no loss at all, and even if its floating charge had crystallized, its interest in the premises would have been quite different from the interest of Scoffin and Willmott, Ld., who were freeholders. How, then, can there be a joint insurance, in any true sense of that phrase, of the interest of a freeholder in freehold premises and the interest of a debenture holder holding a floating charge on that mass of property, including, among other things, those premises ? There is no joint risk ; there is no joint interest ; the measure of loss suffered by those two parties will be different, calling for a different measure of indemnity, and, accordingly, it seems to me that there is no joint element about the thing at all.

Such a policy, in my judgment, may be more accurately described as a composite policy, because it comprises, for reasons of obvious convenience, in one piece of paper the interests of a number of persons whose connection with the subject-matter of the insurance makes it natural and reasonable that the whole matter should be dealt with in one policy. I make those observations, although they are not strictly necessary having regard to the view which I have formed of the true meaning

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of the policy. Even if it was possible to have a joint policy in favour of those three persons—using that phrase in the sense in which Mr. Miller used it—this document is not such a policy on its true construction. The description of the insured by name, followed by the words, "for their respective rights and "interests," in my judgment, read in its natural sense, indicates that these three persons, having interests which it is not material to investigate for the purpose of the document, are minded to combine in one policy and each of them to obtain cover from the underwriters in respect of his right or interest, whatever it may be—and it may vary from time to time. One obvious way in which a variation might have taken place would have been if the bank, during the currency of the policy, had proceeded to enforce its floating charge. But I find myself unable, without doing violence to the language, to give to the words "for their respective rights and interests" any other meaning than that which I have indicated. If I am wrong in the view which I have expressed as to the impossibility of having a joint insurance in the true sense of "joint" in such circumstances as these, nevertheless the peculiar, and, indeed, so far as any authority we have been referred to, unprecedented, character of such a contract is a thing which would lead me to construe the policy in such a way as to avoid so curious a result. But I need not call in aid any considerations of that kind, because the words taken by themselves, in my opinion, negative it. So much for the actual phrase to which we have referred.

But, of course, the document must be construed as a whole, and what seems to me to be the meaning of that phrase might have to yield to other indications in the document if that were necessary to produce a proper and fair construction of it.

What is principally relied on as indicating the joint character of the contract is the undertaking which I have already read, to "pay to the insured the value of the property or the amount "of the damage." It is said that this is a joint insurance covering the totality of the interests of the insured, the measure of the indemnity to be provided being the value of the property or the amount of the damage; that the corporation have no concern with the question whether any one of the three, or any one or two of the three, could make a claim in the sense that he or they had suffered a loss; and the corporation is merely concerned with the totality or aggregate of the insured, and the aggregate of their interests.

Even giving that construction to the words, it does not appear to me that it really supports the argument of a joint policy. The most that it amounts to seems to me to be this. The three persons in question, having effected a composite policy, under which the individual losses of each one of them lead to an indemnity by the corporation, the corporation, when making payment, can make it, and perhaps is bound to make it, to all three. But the method in which the payment is made, and the persons to whom the payment is made, cannot, in my view, affect the true nature of the contract in pursuance of which the payment is made, if its true nature is to indemnify each of the named insured in respect of his individual loss. The fact that payment falls to be made to all three of them—if that be the true construction—does not and, in my view, cannot have the effect of turning that payment into a payment of indemnity to all three, and for this very simple reason. In the present case, in the matter of the stock the only persons who suffered a loss were Plant Brothers, Ld., themselves; nobody else suffered one penny of loss. By virtue of that loss, only Plant Brothers, Ld., become entitled to be indemnified. The payment, if it falls to be a payment to all three by name, is, and must be, in essence a payment in discharge of that loss in respect of which the indemnity has become operative.

But, in my opinion, the clause in question, on its true construction, does not call for a payment to all three in respect of any loss suffered, even if only one be interested in that loss. It appears in the printed part of the document and must be read in the light of, I will not say the definition of "the "insured," but the reference to the insured in the endorsement, which contains the words "for their respective rights and "interests." How is that description of the insured and that description of the indemnity to which they are to be entitled

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to be fitted into the printed form which uses the phrase "the "insured"? It seems to me that, wherever the phrase "the "insured" appeared in the printed part of this document, it would be wrong to treat that as meaning, as a matter of construction, all the three persons named in the endorsement. The printed words "the insured" must be construed and qualified by the words "for their respective rights and "interests," and those printed words must be given a construction which will fit in with the essential nature of the contract which is being undertaken.

Accordingly, I am of opinion that the provisions as to payment must be construed as being an undertaking to pay to that one, or those two, or those three, of the named insured that indemnity to which each is entitled having regard to the loss which he had suffered. If the loss is a loss which only one has suffered, this undertaking to pay must be construed as an undertaking to pay him, and to pay him the sum which will indemnify him against his loss. Thus in the case of Scoffin and Willmott, Ld., as freeholders, and Plant Brothers, Ld., as tenants at will, each of them is entitled to claim from the corporation and to receive such a sum as, having regard to their individual interest in the premises, will indemnify them for the loss which they have sustained.

That is my opinion as to the construction of this clause, but, as will appear later, even if this clause be construed as a clause for the machinery of payment to all three, it would not affect the result. There are other clauses in the conditions which have been relied on, and those clauses, or several of them, relied on by the respondents, confirm the view which I have taken as to the meaning to be given to the words "the insured" throughout the printed part of this policy. First, condition 2 provides that the "policy shall be voided with respect to any "item thereof in regard to which there be any alteration after "the commencement of this insurance . . . . (*c*) whereby "the insured's interest ceases except by will or operation of "law." If the insurance be treated as a joint insurance, and the words "the insured" are to be construed as meaning the three, that clause has no effective meaning because, the interests of the three persons being different, as I have stated them to be, I cannot see how those interests can cease except by all of them dropping out of the picture. There is no joint interest at all. Moreover, if "the insured" is construed in the way in which Mr. Miller would construe it, one result would be that if, for instance, a particular part of the property ceased to belong to any of the parties—for instance, if the freehold was sold and Plant Brothers, Ld., ceased to be tenants of it—that item would have dropped out. They would have ceased to be interested in it. Their interests in those capacities being totally different from the interests of the bank, on the argument of Mr. Miller, as I follow it, it could not be said that this clause applied to these facts. As a matter of business and common-sense, it is quite obvious that the clause, if it is to have any useful result at all, must apply to such a situation.

The next condition, which is particularly relied on by the respondents, is No. 8, which contains the usual provisions as to average and is in these terms: "If at any time of any "destruction or damage to any property hereby insured "there be any other insurance effected by or on behalf of the "insured covering any of the property destroyed or damaged, "the liability of the corporation hereunder shall be limited to "its rateable proportion of such destruction or damage." If "the insured" there means all three of them, that condition could only come into operation if all three of them together effected another insurance. The condition would not come into operation if, for instance, Plant Brothers, Ld., on their own behalf insured part of the property with another office. The condition would not apply if the words "the insured" referred to the three jointly. The condition must surely be intended to cover the case where any individual of the three effects another insurance. Otherwise there would be a serious gap in the effectiveness of the clause. If condition 8 did not apply to such an insurance, I cannot see by what method it would be possible, either on the ground of contribution, or on the ground of subrogation, that the other office could obtain any contribution from the corporation, or the corporation obtain any contribution from the other office. The true construction of the words again, in my judgment, must be moulded by reference to the governing phrase, " for their respective rights and interests," and given a businesslike effect in consequence.

The last matter relied on in the printed form is in the memorandum which provides for the benefit of the insurance to pass to a purchaser of any building who has completed his purchase. It begins with the following words: " If at the "time of destruction or damage to any building hereby insured, "the insurer shall have contracted to sell his interest in such "building and the purchase shall not have been made but shall "be thereafter completed, the purchaser shall be entitled to the "benefit of the policy. Surely that clause should be intended to cover the case where one of the three persons named, namely, Scoffin and Willmott, Ld., sold their freehold interest. The only way in which it could be given effect is by treating " the insured " again as meaning each and every of them as circumstances may require.

As against that, reliance is placed by Mr. Miller on condition 4, which calls for a notice in writing to be given by the insured, and a claim in writing to be delivered by the insured, and if necessary a statutory declaration by the insured. In my opinion, the obligation there lies on that one of the insured who is making the claim, or who is entitled to make the claim; that is to say, that one of the insured who has suffered a loss in respect of which he is entitled under the policy to claim indemnity from the corporation. I do not think that I need refer to any more of these conditions, because they must all of them be construed on the principles which I have endeavoured to state.

That being, in my opinion, the nature of the contract, what was the position when this fire took place? First, let me take the buildings. When the fire took place, Plant Brothers, Ld., had suffered a loss, because they, as tenants at will, had suffered from the destruction of the buildings of which they were such tenants. Scoffin and Willmott, Ld., had suffered a loss in that the buildings of which they were the owners in fee simple, subject to a tenancy at will, had been destroyed. The fire admittedly was feloniously caused, but it was not admitted, nor was it established or indeed attempted to be proved, that the crime of firing these premises was one for which Plant Brothers, Ld., were responsible. All that was admitted was that an individual in their employment had set fire to the premises. Accordingly, so far as the claim for the premises was concerned, treated by itself, there never was any answer to it. It was a perfectly bona fide claim, and a claim which could have been made by Scoffin and Willmott, Ld., in respect of their loss, to which no exception could possibly have been taken. As we know, Scoffin and Willmott, Ld., did not in fact put in a claim, and for a perfectly intelligible reason, that Plant Brothers, Ld., their controlled subsidiary, were putting in a claim and putting in a claim on the basis that they were entitled to recover the full amount of the damage—a claim which was not contested and which has been accepted. Scoffin and Willmott, Ld., as a matter of business, were obviously content to allow their subsidiary to receive the money, because they were in a position to see that the business-like thing was done and the money was expended, as we have been told it was expended, on re-instating the premises. The position, therefore, was, as I have said, that, with regard to that claim, there was no possible answer to it. There was no answer to the claim, either by Messrs. Plant Brothers, Ld., as tenants at will, or Scoffin and Willmott, Ld., as freeholders, if they had chosen to make a claim. The bank had no claim whatsoever, because they had suffered no loss in respect of the buildings. The damaged building was pro tanto replaced by the claim under the policy which itself came under the floating charge. The bank, therefore, had suffered no loss, and had no locus standi at all to make a claim. So far as the buildings are concerned, the only persons who had suffered loss, and the only persons who could call for an indemnity, were Scoffin and Willmott, Ld., and Plant Brothers, Ld.

The stock stands on a different footing. The only persons who could make a claim in respect of stock were Plant Brothers, Ld.; they were the only people who had suffered loss. The bank had not suffered a loss for the same reason which I gave a moment ago. Scoffin and Willmott, Ld., had suffered no loss, because neither as shareholders in Plant Brothers, Ld., nor as guarantors of the overdraft of Plant Brothers, Ld., did the loss of the stock cause them any damage at all. They, therefore, could not make a claim, and any money paid out by the corporation by reason of that fire, in respect of that stock, cannot in its nature have been a payment in respect of a contract of indemnity with regard to loss by them. Those two persons have suffered no loss; the only contract of indemnity which called for a payment was the contract of indemnity by which Plant Brothers, Ld., were entitled to claim.

In their claim in respect of the stock, Plant Brothers, Ld., were admittedly fraudulent, and it is claimed that as they put forward one claim, and one claim only, in respect of the stock and premises, the fraudulent overstatement of the claim affected the whole of the claim and brought into operation the condition in the contract by which the corporation were exempt from liability. I do not pause to examine the correctness of that proposition, because, in my judgment, it is not relevant to consider it for present purposes.

Those being the claims to which the fire gave rise, and those being the indemnities which the corporation had contracted to give in those circumstances, the claim is put in by Plant Brothers, Ld., and by Plant Brothers, Ld., alone. I am certainly not going to assume that that was being done without the knowledge of the bank or without the knowledge of Scoffin and Willmott, Ld. To make any such assumption would be to shut one's eyes to the ordinary business habits of mankind. Scoffin and Willmott, Ld., the controlling company, with directors of their own on the board of Plant Brothers, Ld., must have known what was being done. The bank, which, as a matter of fact, held the policies, gave them up when the fire took place. The banks had local branches, and it cannot be supposed that the bank did not know all about it. They were not concerned, in any case, to make a claim because, as I have said, they had suffered no loss. Their position was not affected, because if and when Plant Brothers, Ld., received money from the underwriters that money would become subject to the floating charge and the security of the bank would be as good as it was before.

On the face of it the claim is a claim by Plant Brothers, Ld., alone. I do not myself attach to that circumstance any conclusive importance. Its significance lies in the fact that it shows what the business position was and, in my opinion, correctly expresses what the parties intended by the document itself. But it is, strictly speaking, irrelevant to the reasoning on which my conclusions are based. Great reliance was placed on it by Mr. Willink, but I do not think it is necessary, for his case, to attach too much importance to those precise facts.

One further matter on which great stress was laid was the fact that on the Lloyd's policy an endorsement was procured authorizing the underwriters to pay the brokers the amount due, and that authority was signed by Plant Brothers, Ld., alone. Again I do not think that that circumstance has any real determining effect.

I come to the actual matters relied on by the plaintiffs. It is said that the money paid under the authority was paid to the three drawees of the cheques jointly ; that they jointly received it ; that the joint payment and joint receipt took place under a mistake of fact ; and that, therefore, the plaintiffs are entitled to recover. Mr. Miller asserts that proposition, irrespective of whether his construction of the policies themselves is accepted or not. He says that, even if the policy is not a joint policy in the sense in which he uses that phrase, but is a composite policy in the sense in which I have used that phrase, nevertheless, when the payment itself is examined, it is in truth a payment to all three, and he further says that the quality of that payment and its true nature is to be ascertained irrespective of the construction of the policies themselves. I cannot take that view. It seems to me that the quality and the nature of what was done in the matter of payment is to be ascertained primarily by looking at the nature of the obligation in satisfaction of which the payment was intended to be made. Parties as a rule intend to perform their contracts, even though they do not perfectly understand them. They intend when

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they make a payment, which they conceive to be a contractual obligation, to make that payment for the purpose of discharging that obligation, even if the precise nature of the obligation is obscure to them. In the present case the payment made was, in my judgment, intended to be, and must be regarded as being, a payment made for the purpose of discharging the contractual obligations, whatever they were, undertaken by the underwriters under the policies.

It is here—although Mr. Miller does not admit it—that what I conceive to be the crucial question of joint insurance becomes of great importance. If the insurance was a joint insurance in Mr. Miller's sense, that is to say, a joint indemnity and an obligation towards the three jointly, I could understand an argument which would say: "When the cheque is drawn in "favour of the three jointly and is paid to them and is handed "to them, that operates as a discharge of an obligation to all three "of them. Before the payment, the three of them had a claim; "after the payment, that claim was satisfied by payment." It would follow from that, that it could truly be said, as it seems to me, that the money was received by the three payees in discharge of an obligation in which all three of them were interested, and in respect of which all three of them had a title to sue beneficially for themselves.

But if the contract is not of that character, then what is the alternative? It seems to me to follow of necessity that the payment by the underwriters must be regarded as a payment made in discharge of their contractual obligations to indemnify against loss. The only person who could claim such an indemnity was Plant Brothers, Ld., subject to the complication with regard to the freehold premises, about which I shall have a special word to say in a moment. But leaving that out of the claim for a moment, Plant Brothers, Ld., were the only people who could claim an indemnity. They were the persons beneficially entitled to that money. If that money had got into the hands of the Midland Bank, they would have been entitled to get it back from them. If it had got into the hands of Scoffin and Willmott, Ld., they would have been entitled to get it back from them. The other two, even assuming the construction of the covenant to pay to be a covenant to pay to the three jointly, would merely be recipients for the benefit of the person whom the underwriters had contracted to indemnify, namely, Plant Brothers, Ld., and they would be under an obligation to pass the money on to the person who had suffered the loss. So whether the cheques were rightly made out in favour of the three for technical reasons based on the construction of that clause, or made out in their favour in an excess of caution and as the result of a misreading of the contract, does not appear to me to matter. The substance of the matter is, that Plant Brothers, Ld., were entitled, as between themselves and the other two, to insist on the payment of that money over to them, and the other two were mere names who happened to come into the transaction.

On that basis can it be said that the Midland Bank and Scoffin and Willmott, Ld., received this money ? The cheques reached their hands. They, in fact, endorsed them. The cheques were honoured. Is that a payment to them ? I will assume, in Mr. Miller's favour, that it is. But what is the nature of the payment ? If, on the true construction of the contract, the cheques ought to have been made out to Plant Brothers, Ld., alone, the insertion of the names of the other two was a mere mistake and their endorsement of the cheques, in order to make the cheques negotiable in the hands of the person entitled to them, namely, Plant Brothers, Ld., could not have the effect, in my judgment, of making them recipients of the money and, therefore, liable to a claim for repayment on the ground that the money was paid under a mistake of fact. I entirely decline to accept the proposition which Mr. Miller was minded to put before us, that a person whose name is inserted by mistake in a cheque as payee, and who endorses it and hands it over to the person entitled to the payment, namely, the person who ought to have received the cheque in the first instance, is liable to repay that money to the drawer of the cheque, if it turns out that the cheque was drawn under a mistake of fact. Such a conclusion appears to me to be one which shocks the senses, and I certainly decline to hold anything of the kind. If, therefore, these names were put in unnecessarily ex abundanti cautela, recovery is quite impossible.

Supposing, on the other hand, that they were put in because, contrary to my view, the payment clause calls for actual payment to the three, what would the result be on that view? Assuming that I am right in construing this contract as a contract with each of the assured in respect of his interest to indemnify him against loss, the insertion of a clause requiring payment of the three cannot affect the right of one of them to claim the totality and compel us to treat the money as having been paid to the three. Their obligation being to pass it on to one of them, I cannot see how, when once they have done that, a claim for repayment can be made against them. In the case of an agent, it is settled law that when once he had paid over the money to his principal, no action for money had and received, based on an allegation that the payment was made under a mistake of fact, will lie against him. If money passes through the hands of persons who are mere conduit pipes and nothing else, I cannot see how a claim can be made against such persons if the money has passed from their hands and has come to rest in the place where it ought to be.

Accordingly, in my opinion, the appeal fails, because the appellants fail to establish that the money was paid to, and received by, the Midland Bank and Scoffin and Willmott, Ld.

There is one other matter, that of the freehold, to which I said I would address a few remarks. In the case of the freehold, the claim made by Plant Brothers, Ld., and paid by the corporation in respect of the claim by Plant Brothers, Ld., was, in point of fact, an excessive claim, for the reason that it was appropriate, and appropriate only, to a freeholder. The loss suffered by Plant Brothers, Ld., by the burning of the premises, of which they were only tenants at will, could not possibly have been anything like the amount which was actually paid. Everybody concerned quite clearly treated the claim as one in respect of the full interest in the property. If it be said that somewhere in that payment there is to be found wrapped up a payment in satisfaction of Scoffin and Willmott, Ld.'s, claim, notwithstanding the fact that they did not specifically claim, and that to the extent of their interest in those moneys they must be treated as having received them, the answer, in my opinion, quite clearly is: On what ground could that money be recovered from them? They made no fraudulent claim; the money was not paid in respect of any fraudulent claim of theirs; it was either paid without a claim at all, if it is to be treated as a payment to them, or it was paid by reference to, and in reliance on, the claim put in by Plant Brothers, Ld., in respect of the premises. As I have already pointed out, there was no element of fraud about that, and even if Plant Brothers, Ld., in their own claim in respect of the premises, had been guilty of fraud, that would not affect Scoffin and Willmott, Ld., at all. The result, therefore, is that even if it be right—and I do not think it is right—to regard Scoffin and Willmott, Ld., as recipients of part of the money paid in respect of the claim for the premises, I can see no ground on which that money can be recovered from them. Indeed, there was no injustice about it whatsoever, because the claim was a perfectly good claim and one which ought to have been honoured by the corporation in any event.

That really concludes all I have to say on the substance of the matter. Many matters were argued, and many points arose, to which I have not found it necessary to refer. I followed them, I hope, and understood them, and if I do not deal with them specifically it is because I find it unnecessary to do so, having regard to the view which I take.

[In conclusion His Lordship referred to amendments of the pleadings, the first of which was made by the direction of the Court to raise the point that Plant Brothers, Ld., in putting in the claim were acting on behalf of the three insured, and continuing, said that another amendment arose in this way.] The payments, recovery of which is sought, are alleged to have been made by four cheques, the first two cheques being in respect of the building claim, and the other two cheques being in respect of the stock claim, one cheque in each group, of course, being the cheque of the corporation, and one cheque being the cheque in respect of the Lloyd's underwriters' liability. Those cheques, which it is said were the payments, recovery of which the plaintiffs claim, were, in the case of the Lloyd's policy, the cheques of the brokers, and accordingly on the pleading as it stands it is alleged that the delivery of those cheques by the brokers made out to the three insured was a payment by Lloyd's underwriters. That proposition could only be supported on the hypothesis that on the facts of this case the brokers, in paying, were paying as agents of the underwriters. It is certainly not the case that by any custom or rule of law a broker who pays his client is paying as agent for the underwriter. The broker is the agent of the insured for effecting the policy and making claims, and so forth, but he is not the agent of the underwriter, and I have never heard it suggested before that, for this particular purpose of satisfying claims, the broker is the agent of the underwriter. In my opinion the proposition is entirely unwarranted. Accordingly it became necessary for the plaintiffs, in respect of the Lloyd's policy, to fall back on an alternative case, and on the basis that the brokers were the agents of the insured to collect the money from the underwriters, payment to the brokers is to be treated, it is said, as payment to the agents of the defendants, and those agents paid over that money by their own cheque to the defendants. To enable that case to be raised, again we allowed an amendment of the pleadings, and we did so because it is extremely unfortunate, if matters go to a higher tribunal, that there should be the slightest question as to the pleading basis on which the argument was conducted in this Court. We, therefore, formally required an application for leave to amend, and we formally ruled on that application, and the amendments in writing have been allowed.

In the result, the appeal fails and must be dismissed with costs.

SCOTT L.J. I agree.

GODDARD L.J. I agree. I only want to add one word in deference to Mr. Miller's argument, with regard to the endorsement on the cheque by the two defendants being payment. No one doubts the authority of the cases which he cited bearing on the payment by bill or note of obligations. In those cases, no doubt it is said that where a cheque is paid in respect of an obligation and is received as payment, it is conditional on the cheque being honoured, and when the cheque is honoured the payment dates back to the time when the cheque is given. But if a cheque is given to a person who has made no claim to it and is asserting no title to it, and he has handed the cheque to the person who does assert title to it, it cannot, in my opinion, be said that there has been any payment to that person, because there has been no obligation. There is no obligation, and the person who has received the cheque and endorsed it does not thereby assert a title. In truth, what the Midland Bank and the other company did in this case was, as it seems to me, by putting their endorsement on the cheque, to turn it from an order into a bearer cheque under s. 8 of the Bills of Exchange Act, so as to enable the person who did claim title to the cheque to obtain the money as on a bearer cheque.

Appeal dismissed.
Leave to appeal to House of Lords granted.

Solicitors: *William Charles Crocker*; *Simmons & Simmons*; *Edward D. K. Busby.*

H. C. G.

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WIMBORNE AND CRANBORNE RURAL DISTRICT COUNCIL *v.* EAST DORSET ASSESSMENT COMMITTEE.

Rating—" Agricultural land "—" Land used as a race-course "—Pasture ground used several times a year for motor-cycle racing—Field whether separate rateable hereditament from farm—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 2, *sub-s.* 2.

The Local Government Act, 1929, s. 67, exempts agricultural land from rates.

The Rating and Valuation (Apportionment) Act, 1928, s. 2, sub-s. 2, provides: " ' Agricultural land ' means any land used " as arable, meadow or pasture ground only . . . . but does " not include . . . . land used as a race-course."

A farmer, whose farm, as being an agricultural hereditament did not appear in the valuation list, allowed one of his fields, which was at all other times used for pasturing his cattle, to be used on two afternoons in 1937 and on four afternoons in 1938 by a motor-cycle club for the holding of motor-cycle races, the club paying him at an agreed rate for their use of the field :—

Held, by the Court of Appeal, (i.) that, for purposes of rating, the field could be treated as a separate hereditament from the rest of the farm ; and (ii.) that the field was not agricultural land within the meaning of the above sub-section, inasmuch as it was not " land used as . . . . pasture ground only," but was " land used " as a race-course," and consequently that it was not exempt from payment of rates.

Appeal from the decision of a Divisional Court on a case stated.

One William George Atkins was at all material times the occupier of a farm known as the "Home Farm," in the parish of Corfe Mullen, in the county of Dorset, comprising eleven fields, having an area of 150 acres, which, as an agricultural hereditament, did not appear in the valuation list.

Save as hereinafter mentioned, one of the said fields, situated at Waterloo Road, in the said parish, and seventeen acres in extent, was at all material times used by the said Atkins for the purpose of pasturing cattle in connection with his business as a farmer, carried on on the said farm.

On two afternoons in 1937, and on four afternoons in 1938, the said field was used by the Ringwood Motor Cycle and Light Car Club for the holding of motor-cycle grass track race meetings, the programme of the club describing the track on which the races were held as a "course."

On the four days in 1938 on which the field was used for motor-cycle racing, the attendances were: May 22, 2400; June 26, 2350; August 28, 1600; September 25, 2200.

The charge for admission on these occasions was 1*s.* per head, and in addition charges were made for motor-cars, motor-cycles and bicycles taken into the field or parked in the adjoining field. On these occasions the club took 356*l.* in gate money, after allowing for tax. In addition, the club obtained some receipts by letting the rights to supply refreshments. The money received by the club on these occasions was expended in prize money and expenses.

The track used by competitors was marked out by means of fencing, which was put up and taken down by the said Atkins some assistance being given by some members of the club. The position of the track was moved slightly at the four different meetings.

The club paid to Atkins for the use of the field, including the erection and removal of fences, and any necessary cleaning and tidying of the said field, and repairs to fences, and an occupation road, the sum of 10*s.* per hundred spectators. During 1938 42*l.* 14*s.* was so paid.

The effect of using the said field for the purpose of motor-cycle racing was to impair the grass to some extent, especially at the corners of the track, where bare patches were left, but not substantially to affect the use of the field as pasture land in connection with the Home Farm.

On March 18, 1938, the Wimborne and Cranborne Rural District Council, as rating authority, made a proposal for the amendment of the valuation list for the said parish of Corfe Mullen (Catchment Area within) by the insertion therein of a hereditament consisting of the above-mentioned field, numbered and described as follows: Assessment No. 632; Description of property, Land used for the purposes of and in connection with motor-cycle track racing; Name or situation of property, Waterloo Road; Estimated extent, 17 acres; Gross value, 50*l.*; Rateable value, 47*l.*

On November 16, 1938, the East Dorset Assessment Committee heard, determined and rejected the said proposal.

Against that decision the said rural council lodged an appeal to the East Dorset Quarter Sessions, to which the assessment committee were the respondents.

On January 4, 1939, the appeal came for hearing before the rating appeals committee of the county justices, appointed by the said quarter sessions, when the above-mentioned facts were admitted or proved.

It was contended on behalf of the rural council: (*a*) that the said field was occupied and used as a race-course; (*b*) that the field was not land used as pasture ground only; (*c*) that the field was not agricultural land within the meaning of s. 2, sub-s. 2, of the Rating and Valuation (Apportionment) Act, 1928; (*d*) that the field was a separately rateable hereditament.

It was contended on behalf of the assessment committee: (*a*) that the said field was not a separately rateable hereditament; (*b*) that the field was land used as pasture land only within the meaning of s. 2, sub-s. 2, of the Act of 1928; (*c*) that the field was not land used as a race-course within the meaning of s. 2, sub-s. 2, of the Act.

The appeals committee of quarter sessions accepted the contentions of the rural council, and rejected those of the assessment committee, and the appeals committee, therefore, allowed the appeal, and ordered that the matter be remitted to the assessment committee to determine the gross and rateable value of the hereditament; but they stated a case for the opinion of the High Court.

The question upon which the opinion of the Court was desired was whether, on the facts proved or admitted, the appeals committee arrived at a correct decision in point of law. If the Court was of opinion that the decision was correct, the appeal was to be dismissed; otherwise the Court was to say what should be done in the premises.

On January 18, 1940, the Divisional Court (1) answered the question submitted to them in the negative, and allowed the appeal. Upon the minor question whether the field was a separately rateable hereditament, that Court expressed no opinion.

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(1) For a report of the proceedings before the Divisional Court see 38 L. G. R. 114; 56 Times L. R. 297.

The rural district council appealed to the Court of Appeal. The appeal was heard on June 7, 1940.

Sydney Turner K.C. and *Scott Henderson* for the rural district council, appellants. The field in question is not exempt from rating. The Local Government Act, 1929, s. 67, exempts agricultural land from rates. The Rating and Valuation (Apportionment) Act, 1928, s. 2, defines agricultural land. Sub-s. 2 of that section provides that "agricultural land" means (inter alia) "land used as arable, "meadow or pasture ground only." Although during the years 1937 and 1938 this field was used exclusively as pasture ground, except for two afternoons in the former year and four afternoons in the latter year, yet as it was used on these afternoons for motor-cycle racing it was not used during these years as pasture ground "only" within the meaning of that sub-section, and therefore was not agricultural land as thereby defined for the purposes of the Act. It is not denied that, in order to prevent land from being agricultural land there must be some substance in the non-agricultural user of it, and that the land may possibly be used for a concurrent purpose which does not materially interfere with its agricultural use and may therefore be disregarded, according to the principle de minimis non curat lex; but this field was used for a purpose which, while it lasted, did substantially interfere with the user of the field for agricultural purposes, namely, for the purpose of motor-cycle racing. Moreover, this field is not agricultural land within the meaning of the sub-section for the further reason that it was "land used as a race-course" which the sub-section provides that the expression agricultural land does not include. The facts stated in the special case to have been admitted or proved show clearly that this field was used as a race-course in fact, and it is submitted that it was also a race-course in law within the meaning of the sub-section. If agricultural

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land is used by its occupier for any non-agricultural purpose which gives it a special independent value to him, it ceases to be exempt from rating as agricultural land. In delivering judgment in the present case in the Divisional Court (1), the Lord Chief Justice relied upon the cases of *Jarvis* v. *Cambridgeshire Assessment Committee* (2) decided by another Divisional Court; and *Tattersall* v. *Marlborough Area Assessment Committee* (3), decided at Marlborough Quarter Sessions by Lord Warrington of Clyffe and other justices; but neither of these cases seems to have any very direct bearing on this case. The question whether this field was a separate rateable hereditament distinct from the farm as a whole, which was left undetermined by the Divisional Court, is a question of fact: *North Eastern Railway Co.* v. *York Union* (4), and on the evidence that question should be answered in the affirmative. This case is one of general importance because of the increasing practice of using agricultural land for collateral purposes.

R. M. Montgomery K.C. and *G. D. Squibb* for the assessment committee, respondents. This field was "agricultural land" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2, and therefore exempt from rating. It was "land used as . . . . pasture ground only" within the definition of "agricultural land" in sub-s. 2 of that section, its use for motor-cycle racing having been too temporary and casual to be taken into account. The Divisional Court rightly took that view, in which they were supported by the judgment of Lord Warrington of Clyffe in *Tattersall* v. *Marlborough Area Assessment Committee.* (3) The fact that the motor racing for which the field was used on certain days was a separate business from the pasturing of cattle for which it was generally used cannot prevent it from being agricultural land. If the definition of agricultural land in s. 2, sub-s. 2, is to be read as meaning that any non-agricultural user of the land, however slight, will prevent the land from being agricultural land, then the exceptions appended to the sub-section are entirely unnecessary. The word "only" must be given some meaning which does not exclude the exceptions. The field was not "land used as a "race-course" within the exceptions to sub-s. 2. As all the relevant facts have been found, there remains only the question of law whether on the facts the field is a race-course within these words. The field does not come within these words, which mean land used as a race-course more or less permanently, and not merely casually as this field was used. The question whether the field is a separate rateable hereditament is not a question of law but of fact. The field is not capable of separate rateable occupation in fact. There is no evidence to show that anyone would acquire the field for the purpose of using it only as a race-course. The Ringwood Motor Cycle Club took the field as part of the farm for the purpose of racing for a very limited time.

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(1) 38 L. G. R. 114; 56 Times L.R. 297.

(2) (1938) 37 L. G. R. 37.

(3) Unreported.

(4) [1900] 1 Q. B. 733.

Sydney Turner K.C. replied.

Cur. adv. vult.

1940. June 13. MACKINNON L.J. This is an appeal from a decision of the Divisional Court on a special case stated by the appeal committee of the Dorset Quarter Sessions. That special case was stated pursuant to the provisions of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

The case arises out of the legislation which exempts agricultural hereditaments from being rateable. One Atkins was the occupier of a farm of some 150 acres at Corfe Mullen, divided into eleven fields. These fields had been previously treated as agricultural land and exempt from rateability.

The special case states as follows: "On March 18, 1938, "the rating authority made a proposal for the amendment "of the valuation list for the parish of Corfe Mullen by "the insertion therein of a hereditament consisting of "one of the said eleven fields numbered and described as "follows: Description of property: Land used for the purposes "of and in connection with motor-cycle track racing." Then the situation is given; and "Estimated extent: 17 acres"; and then come the suggested gross and net values.

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In November, 1938, the assessment committee rejected this proposal; upon which the rural district council appealed to quarter sessions. Then the case proceeds: "On January 4, "1939, the said appeal came on for hearing before the "committee of the justices of the said county appointed "by quarter sessions for the purposes of the Act of 1925, "when the following facts were admitted or proved:" [His Lordship stated the facts as above set out and continued:]

The committee of quarter sessions allowed the appeal and stated this case. The question for the opinion of the High Court was whether, on the facts proved or admitted, the committee of quarter sessions arrived at a correct decision in point of law.

Upon the minor question whether this field was a separately rateable hereditament, the Divisional Court expressed no opinion. I am clearly of opinion that it was. This is one of the eleven fields into which the farm is stated to be divided. We must assume that it is bounded by hedges, or other defined boundaries. And if, from the nature of the user of such a field, it is not within the definition of "agricultural land," I can see no reason why, because it is held by the occupier along with other fields that are within the definition, it should not be treated as a separately rateable hereditament.

Upon the question stated by quarter sessions, namely, whether on the facts found or admitted, they arrived at a correct decision in point of law, the Divisional Court replied in the negative and allowed the appeal.

The question involves a consideration of the definition of "agricultural land" in s. 2, sub-s. 2, of the Rating and Valuation (Apportionment) Act, 1928. The material parts of that sub-section are as follows: "' Agricultural land' means "any land used as arable meadow or pasture ground only . . . . "but does not include . . . . land kept or preserved mainly or "exclusively for purposes of sport or recreation, or land used "as a race-course."

The committee of quarter sessions in effect found that, though this field was, and to a large extent still is, "meadow "or pasture land," it is not "used as meadow or pasture "ground only"; and, secondly, that, within the exception it is "land used as a race-course." The sole question for the Divisional Court and for this Court is whether, upon the facts stated, that is or is not an erroneous decision in point of law.

The Divisional Court held that it was erroneous. As I understand the judgment of the Lord Chief Justice, he based that view upon the ground that the land was "only on particular "and comparatively rare occasions used for the purposes of a "race-course." He also referred with emphasis and approval to some document in which the assessment committee expressed their view that "the very occasional user for the purpose of "motor-cycle racing is not sufficient to take the hereditament "out of the category of agricultural land." I do not know how this document came before the Divisional Court. They were concerned with a special case, and limited to the terms of that case; and no other documents were annexed to it. I infer that the Lord Chief Justice must have referred to it only as expressing the argument which found favour with him.

The material parts of the definition section are "Land used as "meadow or pasture ground only . . . . but not including . . . . "land used as a race-course." It is material to note that the words "mainly or exclusively for the purposes of," in the preceding sentence, referring to "purposes of sport or "recreation," are not repeated in the simple words "land used "as a race-course." The Lord Chief Justice emphasized the user as being "on particular and comparatively rare occasions"; and approved the argument which spoke of "the very occasional "user for the purposes of motor-cycle racing." This consideration is only as to the number of occasions in the year of such user. But having regard to the subject-matter, this is surely in itself a fallacious consideration. Notoriously all "race-"courses" of the most perfect type are only used as such on a few occasions in a year. I have an idea that Goodwood and Ascot are each used only once a year.

There may be another aspect of the casual and unimportant user as a race-course, for instance, if the farmer occasionally allowed youths with motor-cycles to use this field for improvised races among themselves. But on the facts found, the user here was much more elaborate and organized. At the four meetings in 1938, the average attendance at each was about 2140 people, and the club holding the meetings took over 350*l*. in gate-money alone; and the club paid to the farmer over 42*l*. as rent, in addition to payments "for cleaning up the "field, repairing fences and repairing the occupation road." It is also not without materiality that the club paid entertainment tax, which it exacted from the spectators who attended, in addition to the gate-money.

I repeat that the question propounded in the case is: "Whether on the facts found the decision that this was land "used as a race-course was correct in law." Put otherwise, that question must be whether the facts found afforded evidence on which the tribunal could properly find as a fact that this field was used as a race-course within the meaning of the section. If the facts found showed only such casual and unimportant user, that the legal maxim de minimis non curat lex applied, no doubt the Court ought to hold that there was no evidence on which the quarter sessions could so find. But if the user is sufficiently substantial that the maxim de minimis cannot apply, I do not see how this Court can hold that there was no evidence on which quarter sessions could come to the conclusion they did come to.

The Lord Chief Justice referred to one other consideration, namely, that "the very occasional user of the field for the "purpose of motor-cycle racing . . . . was not such as substantially "to affect the use of the field as pasture land in connection with "the farm." With all respect, I doubt if that is a material consideration. In the first place I imagine that it must be true that, except on the occasion of rare meetings, a regular and undoubted race-course like Ascot or Goodwood could be substantially used as pasture; and, secondly, I conceive that the policy of the Legislature is that if the farmer uses his land for commercial profit from other than agricultural operations, it is right that he should, in respect of that user and that profit, be subject to the burden of rates.

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The Lord Chief Justice referred to two other cases, one of which had been before the Divisional Court and the other before a court of quarter sessions. They were concerned with other and different facts: and they seem to me to be of no assistance upon the present case.

In the result, I am unable to agree with the decision of the Divisional Court; and I think that this appeal should be allowed.

CLAUSON L.J. I have had the advantage of reading the judgment which has just been delivered by MacKinnon L.J. and I agree with it; and I find it unnecessary to add anything.

LUXMOORE L.J. I also agree with it, having had the same opportunity.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for appellants: *Peacock & Goddard, for Luff, Raymond & Williams, Wimborne.*

Solicitors for respondents: *Barnes & Butler, for J. W. Miller & Son, Poole, Dorset.*

J. R.

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June 17, 18.

IMPERIAL SMELTING CORPORATION, LIMITED *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LIMITED.

Ship — Charterparty — Frustration — Explosion on ship — No evidence of cause of explosion—Default or otherwise in party setting up frustration—Onus of proof.

A party, prima facie guilty of a failure to perform his contract, cannot escape under the plea of frustration, unless he proves that the frustration occurred without his default. There can be no frustration in the legal sense, unless he proves affirmatively that the cause was not brought into operation by his default.

APPEAL from Atkinson J. (1)

This was a special case stated by an arbitrator, under s. 9, sub-s. 1 (*b*), of the Arbitration Act, 1934.

By a charterparty dated August 5, 1936, Joseph Constantine Steamship Line, Ld. (" the owners "), chartered their steamship *Kingswood* to Imperial Smelting Corporation, Ld. (" the "charterers "), to proceed to Port Pirie, South Australia, to load a cargo as therein provided. On December 26, 1936, the *Kingswood* anchored in the roads at Port Pirie, and, after certain negotiations, it was agreed that the steamer should remain at the anchorage until January 4, 1937, and should then proceed to her berth. At approximately 8.55 A.M. on January 3, while the steamer was still anchored in the roads, there occurred an explosion of extreme violence from the auxiliary boiler, which resulted in such delay that, as was admitted by the charterers, the commercial object of the adventure was frustrated. On the return of the ship to England a Board of Trade inquiry was held under the Boiler Explosions Acts, 1882 and 1890, and this was followed by arbitration, consequent on a claim by the charterers against the owners for failure to load. It was agreed that the *Kingswood* never became an "arrived ship."

In the case, the arbitrator found as follows: "Neither those "who were responsible for conducting the Board of Trade "inquiry, nor any of the witnesses who gave evidence before

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(1) [1940] 1 K. B. 812.

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"me, claimed to be able to state with any certainty the causes "of the disaster, or the sequence of events that led up to it. "The explosion was one of an unprecedented character, and "no sequence of events which was other than improbable was "suggested as capable of having given rise to it. The matter "was rendered still more difficult by reason of the fact that "the donkeyman, who, on the morning in question, was the "only person to be in the stokehold during the ninety minutes "preceding the explosion, was not available as a witness."

The case set forth the various contentions and hypotheses as to the cause of the explosion, and the arbitrator stated: "I am not satisfied that the true cause of the disaster has as "yet been suggested."

Subject to this case, the arbitrator awarded that the charterers were entitled to damages.

Atkinson J. held that the onus was on the charterers to prove that there had not been frustration, that they had failed to discharge that onus, and that their claim failed.

The charterers appealed. The appeal was heard on June 17, 18, 1940.

A. T. Miller K.C., *G. St. C. Pilcher K.C.* and *Charles Stevenson* for the appellants. The point in this case is a simple one and is covered by well established principles. The only point is the question of frustration. To obtain the advantage of the doctrine of frustration the owners must prove that the accident occurred through no fault of theirs. They paid off the man who attended the engine in Australia, and consequently there was no one to give evidence at the inquiry as to how the accident occurred. Where a contract cannot be performed the contractor must prove that the failure to perform was not through any fault of his: *Taylor* v. *Caldwell*. (1) The rule is clearly stated in Halsbury's Laws of England, 2nd ed., p. 542, under the heading of "Burden of Proof." Where a shipowner pleads "perils of the sea" he must prove that he was not at fault: *La Compañia Martiartu* v. *Royal Exchange Assurance*.(2) In the Court below the matter was confused by looking too

(1) (1863) 3 B. & S. 826. (2) [1923] 1 K. B. 650.

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meticulously at cases that are not material to the question here. They also cited *Wakelin* v. *London and South Western Ry.* (1) and *Scott* v. *London and St. Katherine Docks Co.* (2)

Sir Robert Aske K.C. and *P. A. Devlin* (for *A. A. Mocatta* on war service) for the respondents. The real point is whether it is sufficient for a party who has a contract, to prove that the frustration was not his fault, or whether he must prove that it arose through the fault of the other party. All the owners need do here is to set up frustration. It is for the charterers to prove negligence, and that is a question for the arbitrator and is not within the jurisdiction of the Court. In *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (3) the charterers were clearly at fault. The essence of frustration is that the failure to carry out the contract is not the fault of the party setting up the plea. All the owners have to do here is to prove that there was destruction of the means of carrying out the contract. They have not to prove that the destruction was not through their fault or negligence.

There is no authority that in a case of frustration a defendant failed, because he did not prove that the frustration did not arise through his own fault. They also cited *Mertens* v. *Home Freeholds Co.* (4), *Rugg* v. *Minett* (5) and *Robinson* v. *Davison.* (6)

Sir Wilfrid Greene M.R. We need not trouble you, Mr. Miller. Scott L.J. will deliver judgment first.

Scott L.J. This is a very simple case, and these are the facts.

A contract by a charterparty to provide a named ship at a named loading port; inability of the owner to carry out his contract because a donkey boiler exploded and caused serious damage to the ship; no exception in the charterparty covering those facts. The arbitrator was unable to say whether the cause of the accident was or was not the negligence of the

(1) (1886) 12 App. Cas. 41.
(2) (1865) 3 H. & C. 596.
(3) [1935] A. C. 524.
(4) [1921] 2 K. B. 526.
(5) (1809) 11 East, 210.
(6) (1871) L. R. 6 Ex. 269.

donkeyman or other servant of the owner, but held that it was not impossible that it was so caused. On those facts the owners contended that they came within the doctrine of frustration. Mr. Willink, the arbitrator, held that they did not, but stated an interim case under the Arbitration Act, 1924. Atkinson J. held that the contention was well founded. The charterers appealed to this Court.

We are of opinion that the appeal must be allowed on the ground that the arbitrator took the right view. A party prima facie guilty of a failure to perform his contract cannot escape under the plea of frustration, unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.

I say nothing upon the point raised by Mr. Miller as to the onus of proof in a case of negligence under such facts as were proved in the case of *Scott* v. *London and St. Katherine Docks Co.* (1), where there was held to be a presumption of negligence. It is not necessary, for the decision of this case, to consider that presumption of law upon the findings of the learned arbitrator here, and, therefore, I do not deal with Sir Robert Aske's argument on that point and express no opinion as to whether his argument on that point is right or wrong.

It is unnecessary to discuss the numerous cases cited by the learned Judge. The appeal will be allowed, with costs here and below, and judgment in accordance with the terms of the arbitrator's finding.

SIR WILFRID GREENE M.R. I agree.

The only word which I wish to add is that nothing can be more dangerous, when a question of burden of proof has to be considered, than to pick out the language of learned judges used in cases where neither they nor anybody else was thinking of the question of the burden of proof, because it was not a matter which was in issue. The language of many of the authorities examined and cited was used with reference to the

(1) 3 H. & C. 596.

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full facts which were before the Court there, and nobody, I think, would be more surprised than the learned judges themselves who used those expressions to find that those expressions were used and relied upon as affording some assistance on the question of onus of proof, which was a matter which was not being dealt with in those judgments.

I agree with what Scott L.J. has said, and that this appeal must be allowed.

Goddard L.J. I agree.

Appeal allowed.

Solicitors for the appellants: *Parker, Garrett & Co.*
Solicitors for the respondents: *Holman, Fenwick & Willan.*

P. J. B.

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

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June 18, 19.

Master and servant—Servant's action in High Court for negligence of masters' servants—Defence of common employment—Plaint in county court under Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1—*Allegations in both cases the same—Judgment in county court for plaintiff—Effect on action in High Court.*

An employee brought an action in the High Court against his employers for injuries caused by their servants, and subsequently, in anticipation of a plea of common employment in that action, filed a plaint in the county court in respect of the same cause of action under the Employers' Liability Act, 1880. The allegations in the action and the plaint were the same. In the county court the employers, while denying liability, brought into court the maximum amount recoverable under the Act. The employee took that sum out of court in satisfaction of his claim :—

Held, affirming Macnaghten J., ante, p. 74, that the cause of action was the same in both proceedings, and that the employee, having satisfied his cause of action in the county court, could not succeed in the High Court action.

APPEAL from Macnaghten J. (1)

Preliminary point under Order XXV., r. 2.

The appellant, a labourer employed by the respondents, was injured in the course of his work while transporting heavy steel plates from one part of the respondents' works to another on a truck supplied by the respondents. Through the alleged negligence of the respondents' servants, the truck collapsed under the weight of the steel plates, and the appellant was injured.

On October 3, 1938, the appellant began an action in the High Court, claiming damages. On February 10, 1939, probably in anticipation of the raising by the respondents of the plea of common employment, which in fact was pleaded by them by an amended defence on February 14, 1939, the appellant issued a plaint in the Edmonton county court, making a claim under the Employers' Liability Act, 1880, by s. 1 of which a workman claiming such damages is placed in the same position as one not in the employers' employment, so that the defence of common employment in actions under that Act is no longer available, but by s. 3 the amount of damages recoverable is limited. The particulars of claim in the county court plaint reproduced all the relevant allegations in the High Court action. In the county court case the respondents denied liability, but brought into court 468*l.*, the maximum amount which the appellant could recover under s. 3 of the Act of 1880. The appellant took that money out of court in satisfaction of his claim on March 30, 1939. Thereupon the respondents re-amended their defence in the High Court action, setting forth the above facts, and concluding: "The defendants will contend that, by reason "of the premises, the plaintiff is debarred from claiming or "recovering any sum from the defendants in this action."

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(1) Ante, p. 74.

Whereupon, under Order xxv., r. 2, of the Rules of the Supreme Court, 1883, an order was made in Chambers that the above issue should be set down for hearing before the trial of the action.

Macnaghten J. held that the cause of action was the same in both proceedings, and that, consequently, the High Court action was barred.

The plaintiff appealed. The appeal was heard on June 18, 19, 1940.

J. P. Eddy K.C. and *W. B. Frampton* for the appellant. The two proceedings are of a different type. In the High Court proceedings the plaintiff can recover any amount by way of damages, but the defendant can set up the plea of common employment. In the county court proceedings, under s. 3 of the Employers' Liability Act, 1880, the plaintiff is restricted in the amount of damages he can recover, but the defendant is debarred from setting up the plea of common employment by s. 1 of the Act. There is no question of election in this case, and the appellant has done nothing to estop him in this action. When the writ was issued in the High Court the matter was not res judicata.

The judgment of Macnaghten J. was based on *Thomas* v. *Quartermaine* (1), which is not an authority on this point.

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(1) (1887) 18 Q. B. D. 685.

The preamble to the Act of 1880, and ss. 1 and 2 show that the common law right of action is wholly unaffected by the Act. *Munday* v. *Thames Ironworks, etc., Co.* (1), *Brunsden* v. *Humphrey* (2), and *Wilsons and Clyde Coal Co.* v. *English* (3), are not authorities on this point. In *Nelson* v. *Couch* (4), where the plaintiffs had recovered in the Admiralty Court an amount insufficient to cover the damage they had sustained, the proceedings in the Admiralty Court were held to be no bar to a subsequent action in a court of common law. Here the restricted amount the appellant had recovered in the county court might very well be substantially less than the amount of damages he would recover in a High Court action. *Nelson* v. *Couch* (4) was followed in *Midland Railway Co.* v. *Martin & Co.* (5)

There is no question of election under the Act of 1880 such as there is under s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84): see *Perkins* v. *Hugh Stevenson and Sons, Ld.* (6)

The appellant is in no way debarred from pursuing his action in the High Court.

C. L. Henderson for the respondents. The cause of action under the Act of 1880 is the same as at common law. It is endorsed on the writ, and must not be confused with the form of action. For the same cause of action the plaintiff must recover all damages incident to the cause of action once and for all: see Lord Halsbury in *Darley Main Colliery Co.* v. *Mitchell.* (7) That principle is accepted in *E. E. & Brian Smith* (1928), *Ld.* v. *Wheatsheaf Mills, Ld.* (8) Here the appellant recovered damages in respect of the cause of action in the county court, and he cannot pursue his action in the High Court.

Eddy K.C. replied.

SIR WILFRID GREENE M.R. On October 3, 1938, the present appellant issued a writ in the King's Bench Division, claiming against the respondents who were his employers, damages for personal injuries caused by the negligence of the defendants' servant or servants at the defendants' works. The statement of claim was delivered on November 23, 1938; and the defence was originally delivered on December 14 of that same year. On February 14, 1939, the defence was amended, and by the amendment for the first time the defence of common employment was raised. The plaintiff's solicitors had been informed of the defendants' intention to raise that defence, and on February 10, 1939, just before the expiration of the six-months' period referred to in the Employers' Liability Act, the appellant issued a plaint in the Edmonton county court under the Employers' Liability Act, 1880, claiming damages for his injuries. The damages he claimed were 468*l.*, that being the highest amount that, under the Employers' Liability Act, he was entitled to recover.

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(1) (1882) 10 Q. B. D. 59.
(2) (1884) 14 Q. B. D. 141.
(3) [1938] A. C. 57.
(4) (1863) 15 C. B. (N. S.) 99.
(5) [1893] 2 Q. B. 172.
(6) [1940] 1 K. B. 56, 63-4.
(7) (1886) 11 App. Cas. 127, 132.
(8) [1939] 2 K. B. 302.

The facts alleged in the plaint in the county court were in all material respects the same as the facts alleged in the statement of claim in the High Court action.

After that plaint had been issued the respondents re-amended their defence, and the re-amended defence was delivered on April 26, 1939. The amendment then introduced, referring to the plaint, alleged that the proceedings instituted in the county court were in respect of the matters complained of in the High Court action, and alleged that the plaintiff had recovered from the defendants in the county court proceedings the sum of 468*l.*, which had been paid into court with a denial of liability by the defendants. That sum was taken out of court by the plaintiff on March 30, 1939. The amendment then proceeded to raise the contention that, by reason of those facts, the plaintiff was debarred from claiming or recovering any sum from the defendants in the High Court action. Pursuant to an order, the issue so raised was heard before Macnaghten J. and the learned judge held that the respondents' contention in their re-amended defence was right in law, and ordered accordingly. The result of that was that the action was dismissed.

The argument on behalf of the appellant rests upon the proposition that the appellant had two causes of action: (I.) a common law action, to which the defence of common employment might or might not have proved to be a good one; and (2.) a statutory cause of action conferred upon him by the Employers' Liability Act. It was argued that the fact that the county court claim had been satisfied by the taking out of the money in court, could afford no reason why the High Court action should not be allowed to proceed.

Reliance was placed upon the fact that whereas under the Employers' Liability Act damages are limited, at common law they are, of course, at large. It was maintained that, notwithstanding what had happened in this case, it was competent for the appellant to proceed with his High Court action, in order to obtain, if he could, a sum by way of damages over and above the amount that he recovered in the county court. It was conceded that, if that were right, and he did obtain in the High Court action a judgment for any sum greater than he recovered in the county court, he would have to give credit against that sum for the amount he had received in the county court proceedings.

In my opinion, the argument of the appellant is founded on a fallacy. It is to be noted that, notwithstanding the rather jejune language of the relevant county court rule which deals with the taking of money out of court, the sum paid in by the respondents and taken out by the appellant was the precise sum which the appellant was claiming; in other words, when he received that sum, his cause of action was necessarily satisfied. He was receiving exactly that for which he had asked, and his cause of action in the county court was, therefore, unquestionably satisfied.

His cause of action consisted in the series of facts which it was necessary for him to allege and prove in order to substantiate the legal right that he was claiming. In my opinion there can be no question as to the identity of the cause of action. The action in the High Court is an action claiming damages for personal injury caused by the defendants' negligence. The action in the county court is an action for damages for personal injury caused by the defendants' negligence. There was one material distinction between the two actions. That distinction, in my judgment, has no bearing upon the question as to what the cause of action is. The distinction to which I refer is that in the common law action the respondents had, if they chose to avail themselves of it, the defence of common employment which, if it were established, would be a bar to the plaintiff's claim ; whereas in the county court action, within the limits laid down in the relevant section, that defence is denied to the employer. The position, therefore, was that the plaintiff, having a cause of action against his employer for negligence, had two courses open to him : (1.) to raise that cause of action in proceedings in which a particular defence would be available to the employer ; (2.) to raise that cause of action in proceedings in which that particular defence would be denied to the employer. The disadvantage to the workman of the latter course was, that if he chose to fight his employer in the place where the employer could not protect himself by that particular defence, the workman suffered under the disadvantage of having a statutory limit placed upon the damages which he could recover. On the other hand, if he chose to maintain his cause of action in proceedings in which the defence of common employment would be available to the employer, he had the advantage of being able to recover unlimited damages, provided he could get over the difficulty raised by that particular defence. That seems to me to be the true position. The cause of action quite clearly appears to me to be the same. Here is a plaintiff having one cause of action, enforceable in two different ways, in two different courts, subject to different conditions. How can such a plaintiff, when his cause of action in the one set of proceedings has been completely satisfied, carry on the other set of proceedings, and endeavour to recover damages in respect of a cause of action which already has been satisfied ? The appellant here obtained in the county court proceedings the solid benefit of a sum of cash which the employers were, no doubt, induced to pay down because they were deprived of the defence of common employment in those proceedings.

The plaintiff has chosen to satisfy his cause of action in that way, and the advantage to him of doing so was manifest. In my judgment, by taking the course that he did, his cause of action was satisfied once and for all, and can no longer be maintained in the High Court action.

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Wholesale
Society,
Ld.

Sir Wilfrid
Greene M.R

In the result, I am in complete agreement with the decision of Macnaghten J.; and the appeal must be dismissed with costs.

Scott L.J. I agree.

Goddard L.J. I agree.

Appeal dismissed.

Solicitors for the appellant: *Scott Duckers & Co.*
Solicitors for the respondents: *W. Stanley Eastburn.*

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June 25.

GEARS *v.* BRALEY.

Payment into Court—Two claims in one action—Different parties interested in the two claims—Application by defendant to pay one sum into Court—Proper exercise of the discretion of the Court—Order XXII., *r.* 1, *sub-rr.* 1, 2.

Order XXII., r. 1, sub-r. 1, provides: " In any action for . . . . "damages the defendant may at any time after appearance upon "notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined "in one action) in satisfaction of one or more of the causes of "action."

Sub-r. 2 provides: " Where the money is paid into court in "satisfaction of one or more of several causes of action the notice "shall specify the cause or causes of action in respect of which "payment is made and the sum paid in respect of each such "cause of action unless the court or a judge otherwise order " :—

Held, affirming Stable J., that where there are different classes of persons beneficially entitled to damages under two or more causes of action, it would be an entirely wrong exercise of any discretion conferred on the Court under Order XXII., r. 1, sub-r. 2, to allow a lump sum to be paid into Court by the defendant in respect of all the causes of action.

APPEAL from Stable J.

This was a summons taken out by the defendants in an action, asking that they might be at liberty to make a payment into Court in one sum in respect of the claims made in an action by the administrator of a deceased person under the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), and also for damages under Lord Campbell's Act. The action was brought by the husband of the deceased as her administrator. The claim under the Act of 1934 was made on behalf of the persons interested in the deceased's estate. The claim under Lord Campbell's Act was made on behalf of the administrator himself, and all those persons who came within the category of the dependants of the deceased.

Stable J., affirming the Master, refused to accede to the application.

The defendants appealed. The appeal was heard on June 25, 1940.

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H. D. Samuels K.C. and *N. R. Fox-Andrews* for the appellants. This case turns entirely on the alteration made in Order XXII., r. 1, in 1933. Before that alteration was made a defendant could never pay into Court a lump sum in respect of two or more causes of action. The alteration gave a judge a discretion in the matter. Farwell J. exercised the discretion given to him by the alteration in favour of the defendant in *Tallent* v. *Coldwell.* (1) That decision ought to be followed here. The appellant cannot be liable for more than a given sum under both causes of action. If he satisfies the two claims by bringing into Court one sum of money, he ought not to be put to the expense of having to bring in two sums of money. This is a case where the alteration in the rule applies.

Tristram Beresford K.C. and *Ryder Richardson* for respondents were not called upon.

LUXMOORE L.J. We need not trouble you, Mr. Beresford. This is an appeal from an order of Stable J., who refused to alter the decision of Master Ball, on a summons taken out by the defendants, asking that they might be at liberty to make a payment into Court in one sum in respect of the claims made in an action by the administrator of a deceased person under the Law Reform (Miscellaneous Provisions) Act, 1934, and also for damages under Lord Campbell's Act.

Obviously the two causes of action, which arise out of the same event, namely, the death of the person named, are separate causes of action. The cause of action under the Law Reform (Miscellaneous Provisions) Act, 1934, is brought by the plaintiff in this case as the administrator of the estate of his deceased wife. That claim as administrator is made on behalf of the persons interested in the deceased lady's estate. The claim which he makes under Lord Campbell's Act is, it is true, made by him as the administrator of the deceased person; but it is not made on behalf of those persons who are interested in the deceased's estate; it is made on behalf of himself and all those persons who come within the category

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(1) [1938] Ch. 653.

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of the dependants of the deceased lady. Therefore, the persons beneficially interested in the damages recovered in respect of each cause of action are not all the same persons, or are not necessarily the same persons.

Before 1933 it was impossible to make a payment in of one sum of money in respect of a number of causes of action. In each case where there was more than one cause of action, and it was desired to make a payment in, the money paid in had to be allocated to each separate cause of action.

An alteration was made in the rules in 1933. The material Order is Order XXII., r. 1, sub-rr. 1, 2. Reading it shortly, sub-r. 1 of r. 1 provides: "In any action for . . . . damages the "defendant may at any time after appearance upon notice "to the plaintiff pay into Court a sum of money in satisfaction "of the claim or (where several causes of action are joined in "one action) in satisfaction of one or more of the causes of "action." Then there is a provision with regard to tender which is immaterial. Then sub-r. 2 of the r. 1 is this: "Where the money is paid into Court in satisfaction of one "or more of several causes of action, the notice shall specify "the cause or causes of action in respect of which payment "is made, and the sum paid in respect of each such cause of "action, unless the Court or a judge otherwise order."

It is quite plain that the first part of the rule provides that you must, where there are more than one causes of action joined together, and a payment into Court is made, allocate your payments. But by the latter part of the rule an opportunity is given of making one payment into Court in respect of the various causes of action provided the leave of the Court is obtained. Of course, if there is only one person interested, and under the separate causes of action the damages must necessarily go to that one person, it is inconceivable, I think, that the Court would require any allocation of the money. But where there are different classes of persons beneficially entitled to the damages, it seems to me that it would be an entirely wrong exercise of any discretion conferred on the Court under sub-r. 2 of r. 1 of Order XXII. to allow a lump sum to be paid in without any allocation. Difficulties would arise at once with regard to the payment out of the moneys between all the various persons beneficially entitled. Indeed, I am at a loss to understand by what particular procedure the Court could be asked to deal with the matter short of bringing some new action. That would be something which the Court would not be justified in putting on the parties interested in the damages, as a result of acceding to a request by the defendant to allow one sum of money to be paid in in respect to several causes of action.

In my judgment the Master and the learned Judge, in supporting him, were right in the exercise of their discretion in this case, in refusing to allow one sum to be paid in in respect of the various causes of action.

I quite appreciate that this may to some extent cause a hardship on a defendant in cases which, like the present, arise out of fatal accidents, where there are two claims, a claim under Lord Campbell's Act and a claim under the Law Reform (Miscellaneous Provisions) Act, 1934. But although I express my sympathy with the defendants in having to make the allocation, I have no doubt in my own mind that it would be a wrong exercise by the Court of its discretion under Order XXII., r. 1, sub-r. 2, to direct that one payment should be made in respect of the two causes of action. For these reasons I think that the appeal fails, and must be dismissed; and the defendants must be ordered to pay the costs of the appeal in any event.

GODDARD L.J. I agree. If times were more propitious, I could wish that this matter could be considered by the Rule Committee—I hope it may be at some time—because I do think that it puts a very great burden upon a defendant, especially when one remembers that in dealing with damages under the Law Reform (Miscellaneous Provisions) Act, it has been said more than once that you are dealing with what is really a metaphysical problem. If the action comes to trial, that is, if the plaintiff does not take the money out, and at the trial the plaintiff does not recover more in the aggregate than has been paid into Court, although the judge may make a different allocation in the sense that he may give more or less in respect of the loss of expectation of life than is paid into Court and more or less in regard to Lord Campbell's Act, it might happen, and would in many cases be very proper, if he has given no more in the aggregate than was paid into Court, that he should carefully consider what he should do about costs. I think in many cases it would be fair, if the defendant had paid in in the aggregate as much as, or more than is awarded, that the plaintiff should get no costs. That could be dealt with in any case of the kind which might arise. But the difficulty which I see if a lump sum were paid in, is in perceiving how the Master is to deal in Chambers with the question of how much of that lump sum is to go to the widow plaintiff as administratrix of the estate generally, or to the widower as administrator, as the case may be, under the Law Reform (Miscellaneous Provisions) Act, and how much should go to her as administratrix, or to him as administrator, under Lord Campbell's Act, where the beneficiaries or the persons entitled to share in the benefit of the estate may be quite different. I think it is a matter which might be, and probably could be, dealt with by rule, by giving the Master jurisdiction to hold an inquiry, or to hold some sort of trial, if necessary, if it were thought right. But at present I do not think there is machinery for doing that; and it seems to me, for the reasons which my Lord has given in greater detail, which I need not repeat, though I come to the conclusion with some regret, that this order is perfectly right; and we cannot accede to the application which the defendants make.

Appeal dismissed.

Solicitors for the appellants: *White & Co.*
Solicitors for the respondent: *Clifford-Turner & Co.*

P. J. B.

GREENWOOD *v.* CENTRAL SERVICE COMPANY, LIMITED, AND ANOTHER.

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June 26, 27.

Local authority—Accident—Collision of taxi-cab with street refuge—Injury to passenger—Damages recovered—Bollard of street refuge unlighted—Third party notice—Claim for contribution from local authority—No negligence—No breach of statutory duty—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 108, 130—*Lighting (Restrictions) Order*, 1939 (*St. R. & O.* 1939, *No.* 1098), *paras.* 1, 4.

The Metropolis Management Act, 1855, s. 130, provides: "Every "vestry and district board shall cause the several streets within "their parish or district to be well and sufficiently lighted, and "for this purpose shall maintain . . . . a sufficient number of "lamps in every such street, and shall cause the same to be lighted "with gas or otherwise, and to continue lighted . . . ." The Lighting (Restrictions) Order, 1939, para. 1, provides: "Subject "as hereinafter provided, no person shall during the hours of "darkness cause or permit . . . . any light . . . . to be "displayed," and para. 4 provides: "Paragraph 1 of this order "shall not apply to the following lights for the guidance of traffic "in roads:— . . . . (*d*) lamps indicating obstructions upon or "near the carriageway of any road, provided that these are of "a candle power not exceeding 1·0 . . . .":—

Held, (1.) that the statutory duty to keep streets lighted imposed by s. 130 of the Act of 1855 had been temporarily suspended by para. 1 of the order of 1939; (2.) that para. 4 of the order imposed no obligation on a borough council in London, but only conferred power on them to keep obstructions in the highway lighted to the limited extent there stated under s. 108 of the Act of 1855 from being a cause of damage; (3.) that in the absence of negligence on their part a borough council was not liable for personal injury to a passenger in a taxi-cab caused by a collision with a refuge lighted by a hurricane lamp which had gone out.

Wodehouse v. *Levy*, ante, p. 298, discussed and disapproved in so far as it decided that there was an absolute duty to maintain a light on an obstruction lawfully erected in a street.

APPEAL from Deputy Judge Elliot Gorst sitting at Bloomsbury County Court.

On October 7, 1939, the plaintiff, Edna Greenwood, was being driven in a taxi-cab owned by the defendants, Central Service Co., Ld. (hereinafter called the company), along Goodge Street, Tottenham Court Road, at about 8 P.M., when the taxi-cab collided with a street refuge in Goodge Street, with the result that the plaintiff suffered personal injuries. The collision was with the bollard of a refuge, which at the time of the accident was unlighted, and the plaintiff, having originally brought these proceedings against the company, subsequently added the mayor, aldermen and councillors of the Metropolitan Borough of St. Marylebone (hereinafter called the borough council) as defendants after the company had set up the defence that the collision was due to the negligence of the borough council in failing to keep the refuge lighted, and also to the breach of statutory duty under s. 130 of the Metropolis Management Act, 1855. They contended further that the unlighted refuge was a nuisance. The company also gave a third-party notice to the borough council claiming in the event of their being adjudged liable in damages to be entitled to recover from the borough council indemnity or contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935.

The borough council denied that they were guilty of negligence or that they were under the statutory duty alleged, which they contended was taken away by the Lighting (Restrictions) Order, 1939 (St. R. & O. 1939, No. 1098), which by para. 1 prohibited them from lighting the streets. They further said that although para. 4 of the order made para. 1 inapplicable to lamps indicating obstructions in any carriageway provided that the lights were of one-candle power only, they had lighted the bollards of the refuge with hurricane lamps of one-candle power and that it was through no fault of theirs that the lamp on the bollard had gone out. Evidence was given at the hearing in the county court by the borough council's acting engineer that hurricane lamps of one-candle power had been placed on the bollards of the refuges in their district to indicate obstructions; that they found the lamps sometimes went out and that they had a lorry going round on patrol with fifty lighted lamps in it and other officers on duty attending the extinguished lights. It was impossible to get enough lamps to put two lamps on each obstruction and it was a long job to install electric lamps on each refuge post.

The deputy county court judge said that the driver of the taxi-cab had been driving it rather too fast at the time of the accident. He could not find that the borough council had been negligent in any way. There was ample evidence that they had taken measures to illuminate the obstruction in the highway, as far as the statutory rules and orders in force allowed it, and to keep these lights going. It was clear that the hurricane lamps had a way of going out. The means that they employed to keep lights going—namely, having a lorry with lighted lamps parading the streets coupled with officers at various posts attending to the lamps and relying on the valuable assistance of air raid wardens, seemed to him in the circumstances to have been a reasonable way of dealing with a difficult situation. There was no negligence in the method of lighting the bollards. He therefore gave judgment for the plaintiff against the company for 80*l.* and costs and dismissed the action against the borough council and the third party proceedings against the borough council.

The company appealed, but the appeal against the plaintiff had been abandoned and was only continued as against the third parties. The appeal was heard on June 26, 27, 1940.

Gilbert Paull K.C. and *M. Berryman* for the appellants. There was a breach of statutory duty by the council in not having the bollard of the street refuge lighted at the time of the collision and the appellants are therefore entitled to contribution towards paying the damages under the Law Reform (Married Women and Tortfeasors) Act, 1935. The breach is under the Metropolis Management Act, 1855. It was under s. 108 of the Act that the council was able to place the refuge in the street, and s. 130 imposed on the council the obligation to keep the street properly lighted. If the street had been kept well lighted as in peace-time it could not have been said that there was any obligation to light the refuge, but under the Lighting (Restrictions) Order, 1939, para. 1, the council were prevented from lighting the street except to the extent provided in para. 4. That paragraph made para. 1 inapplicable to lamps indicating obstructions upon or near obstructions in any carriageway provided that

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the lights were of 1·0 candle power only and threw no light upwards. To that extent therefore the duty of lighting and keeping lighted remained. Here hurricane lamps had been placed on the bollards of refuges but this particular light had gone out. There was therefore a breach of the statutory duty and that statutory duty was absolute, so that the finding that the council were not guilty of negligence makes no difference: *Baldock* v. *Westminster City Council.* (1) It is true that there was a finding of negligence both in that case and in *Polkinghorn* v. *Lambeth Borough Council* (2), but in the latter case Scott L.J. recognized the existence of an absolute statutory duty under s. 130. That case related to a time of peace, but *Wodehouse* v. *Levy* (3) recognized the continued existence of the statutory duty to the limited extent possible as a result of paras. 1 and 4 of the Lighting (Restrictions) Order.

[MACKINNON L.J. The truth is that the statutory duty imposed by s. 130 of the Act of 1855 has now gone.]

No. The duty to light the streets remains to the limited extent permitted by para. 4 of the Lighting (Restrictions) Order and there has been a breach of that absolute duty.

[MACKINNON L.J. referred to *Great Central Ry. Co.* v. *Hewlett.* (4)]

That case is not really in point here. It turned on the question of who had the authority and duty to light the streets. All the authorities previously cited indicate that there is an absolute statutory duty to light streets and that the question of negligence is immaterial.

The alternative argument is that the unlighted obstruction in the highway constituted a nuisance and that there is a common law duty to keep it lighted or otherwise to prevent its causing injury to passers-by. The difficulty in regard to that is that the only duty in regard to an obstruction lawfully placed in the highway is to take reasonable care to see that it does not become a nuisance. The county court judge did not, however, consider the question of nuisance

(1) (1918) 120 L. T. 470.
(2) (1938) 158 L. T. 127.
(3) Ante, p. 298.
(4) [1916] 2 A. C. 511.

at all. This case is distinguishable from *Hewlett's* case (1) as there there was statutory authority to keep the particular obstruction in the highway. Here the authority under s. 108 of the Act of 1855 is only general. The power to maintain the obstruction must be exercised in such a way as not to cause a nuisance, if that be reasonably possible: see *Vernon* v. *St. James, Westminster, Vestry* (2); *Dormer* v. *Newcastle-upon-Tyne Corporation.* (3) All the county court judge has held is that reasonable care was taken to keep the lamps alight, but there might be a duty to paint the refuge with white or luminous paint.

[They also referred to *Carpenter* v. *Finsbury Borough Council.* (4)]

Edgedale for the respondents. Even supposing that s. 130 of the Metropolis Management Act, 1855, must still be treated as imposing a duty to light streets, the only obligation is to take reasonable care to keep such lights as are now permitted alight. That was clearly the view of Scott L.J. as to the construction of s. 130 in *Polkinghorn* v. *Lambeth Borough Council.* (5) There is not a single authority which says that the statutory duty is absolute.

Secondly, s. 130 has nothing to do with the lighting of obstructions. The duty imposed by it is to light the streets and no doubt that general lighting must suffice to show any obstruction, but that is all. That duty has clearly been done away with by the Lighting (Restrictions) Order. It is to be noticed that in the order it is expressly provided that nothing in the order is to detract from the obligations under the Road Traffic Act, 1937. There is no similar provision in regard to the Act of 1855.

That being so, the position here is the same as was stated by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (6): see also Salmond on Torts, 9th ed., pp. 48, 502. When a duty is created by statute, no action will lie for doing it, unless it is done negligently. Here negligence is ruled out by

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(1) [1916] 2 A. C. 511.
(2) (1880) 16 Ch. D. 449.
(3) [1940] 1 K. B. 586; 2 K. B. 204.
(4) [1920] 2 K. B. 195.
(5) 158 L. T. 127.
(6) (1878) 3 App. Cas. 430, 455.

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the county court judge's decision on the facts and that is conclusive in favour of the respondents.

Gilbert Paull K.C. replied.

MACKINNON L.J. This is an appeal against the decision of the deputy judge of the Bloomsbury County Court. The appeal is brought by the defendant company. They were held liable to pay damages to the plaintiff, who was a passenger in their taxi-cab. The cab ran into a bollard on a street refuge at night-time, and she sued them for damages in respect of her injury. They brought in the Metropolitan Council of the Borough of St. Marylebone as third parties, claiming that they were joint tortfeasors with them, and under the Law Reform (Married Women and Tortfeasors) Act, 1935, were liable to contribution towards the damages they had to pay. The plaintiff has dropped out of the proceedings; and this appeal was solely against the decision of the learned county court judge in favour of the third parties as between the defendant company and them.

The third parties being a street authority erected this bollard on an island in the roadway, pursuant to the powers given them by s. 108 of the Metropolis Management Act, 1855: "It shall "be lawful for every vestry and district board from time to "time to place any posts, fences and rails, on the sides of any "footways or carriageways in their parish or district for the "purposes of safety . . . . and also to place any posts or other "erections in any carriageways so as to make the crossings "thereof less dangerous for foot passengers." The complaint of the defendant company against the third parties is that on the night when this accident happened, this bollard or post, being an obstruction in the highway, was not lighted so as to warn them of its existence. Their claim against the third parties is based upon the allegation that it was their duty to light that obstruction in the highway.

It is said by Mr. Paull that that duty to light this obstruction in the highway arises under a section of the Metropolis Management Act, 1855, namely, s. 130, which provides: "Every vestry and district board shall cause the several streets "within their parish or district to be well and sufficiently "lighted, and for this purpose shall maintain, or set up and "maintain, a sufficient number of lamps in every such street "and shall cause" the said lamps to be sufficiently lighted, and so forth. If this accident had occurred in times of peace, no doubt that obligation would have been imposed upon the third parties. But under the Statutory Order No. 1098 of 1939, which is called the Lighting (Restrictions) Order, 1939, issued by the Secretary of State pursuant to wartime legislation, it was ordered in para. 1: "Subject as hereinafter provided, "no person shall during the hours of darkness cause or permit," any light to be displayed. The effect of that order, which has the force of legislation, was to repeal temporarily the obligation imposed upon the third parties by s. 130 of the Metropolis Management Act. That Act having said they shall cause their said streets to be well and sufficiently lighted, this order having the force of a subsequent enactment, forbids them to maintain such lighting at all.

In my view, any duty which the borough council had to members of the public, or to the appellants in this case under s. 130 of the Act of 1855, disappeared when this statutory order was issued.

Alternatively, it is said that there is a common law obligation upon them, having erected an obstruction in the highway, to use reasonable care to prevent that obstruction being a danger to persons using the highway. Mr. Paull says that they failed to do that, because, notwithstanding this general prohibition as to showing any lights, there was a qualification of it, and a limited permission to the borough council to light this bollard in a particular way. The order goes on to provide in para. 4 dealing with "Lights in roads": "Paragraph 1 "of this Order shall not apply to the following lights for the "guidance of traffic in roads"; and then sub-para. (*d*) is: "Lamps indicating obstructions upon or near the carriageway "of any road provided they are of candle-power not exceeding "1·0, and so screened as to prevent light being thrown upwards, "and any appreciable glow being produced on the road surface." It was, therefore, permitted to the borough council to guard

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against the danger of this post in the highway by lamps of that small illuminative power. In fact the borough council, pursuant to that permission, had provided themselves with a great quantity of what are called "hurricane lamps," which are generally used for this purpose, I understand. All round their borough, wherever there were these bollards or posts on the highway on passenger refuges, they had on each of them one of these lamps; and had taken measures to ensure that, when darkness came on, these lamps should be lit. Unhappily, at the moment of this accident, the particular lamp hanging on the front of this bollard into which the taxi-cab drove had gone out. It was in evidence before the county court judge that there were great difficulties in keeping those lamps always alight: they were apt to go out. But the borough council to the best of their ability had taken steps to guard against that. They had a lorry which went round with lighted lamps; and whenever they found a lamp was out, they replaced it by a lighted one. Unhappily, this accident happened when the lamp had gone out and before it had been seen by their servants and replaced or relit.

Those being the circumstances, the question is whether the defendant company can assert that the third parties are under a liability as tortfeasors jointly with themselves in causing the damage to the plaintiff. That depends upon whether, as Mr. Paull so strenuously contended, the obligation of the third parties to light this obstacle was an absolute one, or whether there was an obligation to use reasonable diligence in the lighting of it and they have failed to do so. The county court judge has held that their obligation was only to use reasonable care; and was not an absolute obligation. I need not go into the evidence, because his finding of fact binds us; but he has found in fact that there was no negligence on the part of the borough council. He says: "I cannot find that there was "anything else they could reasonably have done, having regard "to the number of lights to which they had to attend and the "conditions in which they had to carry out their duties." Then he says: "I find that there was no negligence in their "methods of lighting those bollards at that time." In view of this finding of the county court judge, it was not necessary to consider whether his view that the council might have been liable if they were negligent was correct in law and the point was not argued before us.

As the duty of the council to light the streets under s. 130 of the Metropolis Management Act, 1855, has been temporarily repealed, Mr. Paull can only claim against the borough council for breach of some duty to light the obstruction in the highway outside the obligation of that section. Assuming there is such a duty it can only be a duty to exercise reasonable skill and care. It cannot be an absolute duty. Mr. Paull tried to rely on the principle which he said arose out of the Factories Acts, where it is provided that dangerous machinery must be fenced. That is an absolute obligation, he said; and it is no answer to say that you have used every possible care and skill to do it. But Mr. Edgedale said that those statutes did not apply; and that the proper principle was that laid down by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir.* (1) I think with regard to that Mr. Edgedale is right. Lord Blackburn said: " For I take it . . . . that it "is now thoroughly well established that no action will "lie for doing that which the Legislature has authorized" —that is putting up obstructions in the highway in this case— "if it be done without negligence, although it does occasion "damage to any one; but an action does lie for doing that "which the Legislature has authorized, if it be done negligently. "And I think that if by a reasonable exercise of the powers, "either given by statute to the promoters, or which they "have at common law, the damage could be prevented it is, "within this rule, 'negligence' not to make such reasonable "exercise of their powers." Assuming, as I have, that the obligation of the borough council was to use reasonable diligence to render this obstacle safe and innocuous, the county court judge having found that they did exercise reasonable diligence and that no negligence was proved against them, the result is that this appeal fails and must be dismissed with costs.

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(1) 3 App. Cas. 430, 455.

LUXMOORE L.J. I agree that this appeal should be dismissed. The main question to be determined is what is the duty, if any, of a metropolitan borough council, with regard to the lighting of a permanent obstruction caused by a street refuge, or any part of it, in a street, having regard to the relevant provisions of the Metropolis Management Act, 1855, and the Lighting (Restrictions) Order, 1939 (St. R. & O. No. 1098 of 1939), made under the Defence Regulations.

The question arises in these circumstances. [His Lordship stated the facts.]

The learned county court judge, after hearing the evidence, found that the defendant company were liable for the negligence of their driver, that negligence being that their driver was driving the taxi-cab too fast at the moment of the accident, though it is fair to add that he did not think the driver was seriously to blame. He gave judgment for the plaintiff against the defendant company for 80*l*. and costs on "C" scale; and for the Marylebone Borough Council against the defendant company, with costs to be paid direct to the Marylebone Borough Council. On the third-party proceedings he gave judgment for the Marylebone Borough Council with costs.

The defendant company appealed from the whole of this order; and by the notice of appeal they ask to have the judgment set aside, and that judgment may be entered for them against the plaintiff with costs; alternatively, that judgment be entered in the action for the plaintiff for the sum of 80*l*. with costs against both defendants; or in the further alternative, that there be a new trial. The appellants have abandoned their appeal from that order so far as it affected the order made in favour of the plaintiff, and submitted to their appeal on that head being dismissed with costs. But they ask that the order of the county court judge be varied by the apportionment of the 80*l*. damages, under the Law Reform (Married Women and Tortfeasors) Act, 1935, between the two defendants; and that the Marylebone Borough Council should be ordered to indemnify the owners of the taxi-cab in respect of the sum apportioned to the

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Marylebone Borough Council. The grounds on which the defendant company ask for indemnity and contribution are threefold. It is said that the Marylebone Borough Council were guilty of negligence, breach of statutory duty, and nuisance which caused, or substantially caused, the accident. It is common ground that the lamp attached by the Marylebone Borough Council to the obstruction with which the taxi-cab came into collision was out when the collision happened. The learned county court judge said: "There has been "no evidence called before me to shew that it"—that is the lamp—" had been out for any unreasonable period of time, and "that the Council had remained indifferent to the fact that it "was not alight; or that this was a constant occurrence; or "that they in fact permitted any overt act of negligence. The "act complained of is allowing it to be out. I cannot find that "they at any time were negligent in any way at all. The War "had only been in progress, if that is the appropriate word for "this war, for some five weeks. There is ample evidence that "they had taken measures to illuminate, as far as statutory "rules and orders in force allowed them, the obstructions "or the obstacles in the roadway and to keep these lights "going. It is clear that the hurricane lights have a way of "going out. The means that it employed—namely, having "a lorry with lighted lamps parading the streets, coupled with "officers at various posts attending to them, and relying on "the valuable assistance of air raid wardens, seems to me "in the circumstances at that time to have been a reasonable "way of dealing with a difficult situation. I cannot find that "there was anything else they could reasonably have done, "having regard to the number of lights to which they had "to attend, and the conditions in which they had to carry "out their duties. After all, the black-out operated against "them and their lorries and their officers just as much as it "operated against anybody else. I find that there was no "negligence in their method of lighting those bollards at that "time." That is clearly a finding that the Marylebone Borough Council was not guilty of any negligence; and Mr. Paull

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very frankly admitted that that was a finding of fact with which he could not quarrel.

But he argued that the question whether there was negligence or not did not arise because the Marylebone Borough Council was under an absolute statutory duty to keep the obstruction lighted; and that if for any reason whatever a light went out, without the fault of the Marylebone Borough Council, there was no escape from liability so far as they were concerned. He contended that the statutory duty arose under the Metropolis Management Act, 1855. By s. 108 of that Act, putting it shortly, power is given to a local authority to erect street refuges in the carriageway. [His Lordship then read s. 130.]

It is said that this section imposes an absolute duty to light the obstruction. I do not agree. In my view the section is aimed at quite a different matter, namely, the provision of a system of street lighting. There is nothing in s. 108, or s. 130, which imposes any duty to put any light upon an obstruction; or to do anything more than keep the street well and sufficiently lighted. I think that that is apparent from the whole structure of s. 130. The first part of the section says that the local authority are to cause the streets to be well and sufficiently lighted. It then goes on to say what they are to do for that purpose, that is, to set up and maintain lamps, and so on. Then they are to cause these lamps to be lighted and to continue to be lighted. There is no question but that the Marylebone Borough Council had fulfilled its duty under this section before the Lighting (Restrictions) Order came into being; nor is there any suggestion that they were not properly maintaining their street lighting system at that date.

We were told that there was no other section in this Act, or in any other Act, which has any material bearing on the case; and I proceed on that footing.

The Lighting (Restrictions) Order, 1939, came into force on September 1, 1939. It provides, so far as material to this case, by para. 1: "Subject as hereinafter provided no person "shall during the hours of darkness cause or permit"—I am reading it shortly—"any light to be displayed." This prohibits the showing of any light; and so plainly absolves the Marylebone Borough Council from any liability to keep the streets in their jurisdiction well and sufficiently lighted under s. 130.

But this prohibition is expressly stated to be "subject as "hereinafter provided." The only material provision to be considered in this connection is, I think, para. 4, which deals with "Lights in Roads." That says: "Paragraph 1 of this "Order shall not apply to the following lights for the guidance "of traffic in roads." Then follow a number of provisions about lights, none of which are material, I think, except sub-para. (*d*), which says: "Lamps indicating obstructions "upon or near the carriageway of any road, provided they are "of candle-power not exceeding 1·0, and so screened as to "prevent light being thrown upwards, and any appreciable "glow being produced on the road surface." That paragraph, in my opinion, does not impose any statutory duty; it enables the strictness of the order against displaying any light to be departed from in specified cases.

Our attention was called to a number of authorities relating to accidents which happened in similar circumstances in the last war. In all the cases to which our attention was called, the Court dealt with the dispute on the basis of negligence, though reference was made to the statutory duty of the borough council in question to light the streets under their jurisdiction under s. 130 of the Metropolis Management Act, 1855.

The first case to which our attention was called was *Baldock* v. *Westminster City Council.* (1) Bankes L.J. stated that there were two questions arising on the appeal. The first was whether the local authority were under any duty with regard to lighting a refuge into which the plaintiff's taxi-cab had run; and whether, assuming there was any such duty, there was any negligence on the part of the defendant. Bankes L.J. said this on the question of duty: "With regard to the duty the "position appears to be this: The defendants are under s. 130 "of the Metropolis Management Act, 1855, under a duty "with regard to lighting the streets, and by s. 108 they have the

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(1) 120 L. T. 470.

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"power conferred upon them of placing fences and posts and "arches upon the foot-ways, carriage-ways, and so forth, " and of placing posts or other erections in any carriage-way, "so as to make the crossing thereof less dangerous. They "have, therefore, under these two sections a power and a "duty imposed upon them. Under that power they have the "right to erect this particular shelter, and the statute imposes "no special duty upon them to light it, but does impose upon "them the general duty to cause the streets within their "district to be well and sufficiently lighted, and I should say "prima facie that that duty included a duty to provide sufficient light to indicate the position of any obstruction which "they place in the street under the power conferred upon them "by s. 108." Then he dealt with the facts of the particular case. It is to be noted that the Lighting Regulations that had then come into force were not called to the attention of the Court. The rest of the judgment deals with the question whether there was negligence on the part of the local authority, they having elected to place a light on the obstruction, and, therefore, as Bankes L.J. said, taken upon themselves the self-imposed duty to keep the obstruction illuminated.

The question of the liability of a metropolitan borough council for failure to light a street obstruction was again discussed in *Polkinghorn* v. *Lambeth Borough Council.* (1) The issue to be decided in that case was whether the borough council were guilty of negligence in not lighting a particular obstruction. It is true that Scott L.J. in his judgment referred to the statutory duty of the borough council. After referring to s. 130 of the Metropolis Management Act, 1855, he says (2): " Under that section, it was clearly the duty of "the Lambeth Council to maintain a light which would "prevent one of the obstructions, properly erected under "section 108 for the purpose of assisting foot passengers, "from being a danger to motor traffic in the road." Later, having discussed the facts, he said: "In those circumstances "my view is that the legal position is a very simple one. It "is that, whether you regard the case from the point of view

(1) 158 L. T. 127.

(2) Ibid. 129.

"of statutory duty, or from the point of view of common "law negligence, in either case the failure to maintain the "light is all it was necessary for the plaintiff to prove in "order to establish his right to damages, unless after that "evidence the defendant council gave affirmative evidence "to displace the onus which was put upon them for the "liability for the accident. In the absence of evidence "satisfying the learned judge that they had been "guilty of no fault, and the cause of the light being "extinguished was some cause for which they were not "responsible in law, the liability for the accident remained "upon them."

It was said by Mr. Paull that Scott L.J. in this passage decided that there was an absolute statutory duty on a metropolitan borough council to keep an obstruction in the road or street under their jurisdiction lighted. I do not so read his judgment. It must be remembered that there is a clear distinction between an absolute statutory duty and a statutory duty which imposes a liability to take reasonable and proper care. Mr. Edgedale on this point referred us to a passage in Salmond on Torts, 9th ed., p. 502, where the author says this: " When a duty is created by statute the "breach of which is an actionable tort, it is a question of "construction whether the liability is absolute, or depends "on wrongful intent or negligence on the part of the defendant. "In other words, when a statute provides that a certain "thing must be done, it is a question of interpretation whether "this means that the thing is to be done in all events, or "merely that the person upon whom the duty is imposed "shall use due care and diligence in the endeavour to perform "it, and that if he fails to perform it through no fault of his, "he shall be free from liability." I think it is plain that the passage which I have read from the judgment of Scott L.J. is referring to the latter kind of statutory law, and not an absolute statutory duty; for Scott L.J. refers in detail to the absence of evidence showing that the failure to light was due to no fault of the borough council.

Further, it is to be observed that in *Polkinghorn* v. *Lambeth*

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Borough Council (1) Slesser L.J. and Farwell J. dealt with the case solely on the ground of negligence.

The latest case dealing with the point is *Wodehouse* v. *Levy*. (2) It was said that in that case Cassels J. held that there was an absolute duty on the Marylebone Borough Council under s. 130 of the 1855 Act to keep any obstruction in the street lighted; and that such absolute duty remained notwithstanding the passing of the Lighting (Restrictions) Order. As I have already pointed out, there is nothing in s. 130 imposing any duty to light an obstruction. The duty is to keep the street well and sufficiently lighted. That duty has been abrogated by reason of the provisions of the Lighting Order: and the Marylebone Borough Council can only be liable if there is some duty to keep the obstruction lighted arising under some other provision, or under the common law. It may be that the decision of Cassels J. can be supported on the ground of negligence; because, on the evidence in that case, the Marylebone Borough Council did not in fact make any attempt to provide such a light as is permitted under para. 4 of the Lighting (Restrictions) Order. But be that as it may, I am satisfied that the learned judge was in error, if, and so far as, he held that there was an absolute duty to maintain a light on an obstruction lawfully erected in a street, so that if from any cause whatever, and without any fault on the part of the borough council, the light which was provided failed to function the borough council would be liable.

Putting the duty of the Marylebone Borough Council at its highest in this case, their duty, having undertaken a self imposed duty to light the obstruction, was to supply a proper light of the permitted kind to illuminate it. There was ample evidence to entitle the learned county court judge to find (as he did) that the Marylebone Borough Council provided a proper lamp and took all reasonable steps to see that it performed its proper function.

The last point on which Mr. Paull relied as establishing liability on the part of the Marylebone Borough Council, was

(1) 158 L. T. 127.

(2) Ante, p. 298.

that the street refuge complained of constituted a nuisance; and therefore that it was the duty of the Marylebone Borough Council at common law either to keep a light upon it or to provide a watchman at night-time to warn persons using the street of its existence.

I think the short answer to this point is that the obstruction was erected by the Marylebone Borough Council under the powers conferred upon it by s. 108 of the 1855 Act. There is no suggestion that it was not properly erected. Therefore, it cannot be a nuisance at common law. If authority is wanted for that view, I think it is to be found in the judgments in the House of Lords in *Great Central Ry. Co.* v. *Hewlett.* (1)

For these reasons I agree that the appeal fails, and must be dismissed with costs.

TUCKER J. I agree. In my view the circumstances of this case are almost entirely the same as those in *Polkinghorn* v. *Lambeth Borough Council* (2), the only difference being that the accident in that case arose in peace-time. I think it is clear from the judgment of Scott L.J., which has been referred to by Luxmoore L.J., that in that case Scott L.J. was of the opinion that s. 130 of the Metropolis Management Act, 1855, did not impose an absolute obligation upon the borough council to light the post in question. It is true that Farwell J. based his decision on negligence; but in so doing he expressly stated that he did not mean in the least to differ in any way from the judgment of Scott L.J.

In those circumstances, it appears to me that the Lighting Order (St. R. & O. No. 1098 of 1939) has no bearing upon this case except that it must, no doubt, be taken into consideration in deciding the degree of care which is imposed upon a borough council in present war-time circumstances when a bollard erected by them is unlighted. I think *Polkinghorn* v. *Lambeth Borough Council* (2) shows that where such a bollard is in fact unlighted and causes an accident, the onus is thrown upon the borough council in question to show how the bollard came to be unlighted. In discharging that onus

(1) [1916] 2 A. C. 511.

(2) 158 L. T. 127.

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which is put upon them, it is no doubt very relevant to consider the provisions of the Order to which I have referred, which preclude the borough council from doing the most obvious things which would prevent such an obstruction in ordinary times from being dangerous.

I also agree with what Luxmoore L.J. has said with regard to the case of *Wodehouse* v. *Levy*. (1) On reading that case, I think it is clear that Cassels J. based his decision in part upon the view that s. 130 of the Act of 1855 did impose upon the borough council an absolute obligation ; and I agree that to that extent his decision cannot be supported.

I agree that this appeal should be dismissed.

MacKinnon L.J. When giving judgment I had intended to say something about the case of *Wodehouse* v. *Levy* (1), but, unfortunately, I forgot it. I agree with what has been said by my brothers, that if and so far as Cassels J. decided that there was an absolute duty on the borough council to light this obstacle, I cannot agree with his judgment.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors : *Wyeth & Co. ; William Charles Crocker.*

(1) Ante, p. 298.

H. C. G.

HARLING (INSPECTOR OF TAXES) *v.* CELYNEN COLLIERIES WORKMEN'S INSTITUTE.

C. A.
1940
July 2.

Revenue—Income tax—Loss in trade—Loss deductible or set off against profits for six following years—Inclusion in the six years of the first year after year of loss—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 33, *sub-s.* 1.

By s. 33, sub-s. 1, of the Finance Act, 1926, where a person has in any trade, profession or vocation carried on by him sustained a loss in respect of which relief has not been wholly given under the Income Tax Acts, "he may claim that any "portion of the loss for which relief has not been so given shall "be carried forward and, as far as may be, deducted from or "set off against the amount of profits or gains on which he is "assessed under Schedule D in respect of that trade, profession "or vocation for the six following years of assessment" :—

Held, that the six following years followed immediately on the year of the loss, and that therefore the year following the year of loss in which year the loss formed the basis of assessment was included as one of the six following years.

Decision of Lawrence J. (ante, p. 86) reversed.

APPEAL from a decision of Lawrence J. (1) upon a case stated by General Commissioners of Income Tax. The facts set out in the case are stated in the report of the case in the Court below.

By s. 33, sub-s. 1, of the Finance Act, 1926: "Where a person "has in any trade, profession or vocation carried on by him ". . . . sustained a loss . . . . in respect of which relief has not "been wholly given under s. 34 of the Income Tax Act, 1918 "(which relates to relief in respect of certain losses), or under "r. 13 of the Rules applicable to Cases I. and II. of Schedule D "(which provides for the setting off of losses against profits "or gains in a distinct trade), or under any other provision "of the Income Tax Acts, he may claim that any portion of the "loss for which relief has not been so given shall be carried "forward and, as far as may be, deducted from or set off "against the amount of profits or gains on which he is assessed "under Schedule D in respect of that trade, profession or "vocation for the six following years of assessment."

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(1) Ante, p. 86.

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The question in dispute was whether the words in s. 33, sub-s. 1, of the Act of 1926 "for the six following years of "assessment" included the year of assessment 1937–38 in this particular case.

Lawrence J. held, affirming the decision of the Commissioners, that the year following the year of loss, in which year the loss formed the basis of assessment, was not included as one of the six following years.

The Inspector of Taxes appealed. The appeal was heard on July 2, 1940.

Sir William Jowitt S.-G. and *R. P. Hills* for the appellant.

F. Grant for the respondents.

SCOTT L.J. This is an appeal from a judgment of Lawrence J., and it raises a question as to the correct interpretation of s. 33, sub-s. 1, of the Finance Act, 1926.

It was that Act, it will be remembered, which abolished the previous basis of assessment on the full amount of the balance of the profits or gains upon an average of three years' profits and substituted for it, by s. 29, as the basis of assessment, the profits of the year preceding the year of assessment; the words are "the full amount of the profits or gains or income "of the year preceding the year of assessment."

In regard to losses, which constitute the subject-matter of the appeal, there had been certain provisions before the Act of 1926 to which it is unnecessary to refer, but by s. 33, sub-s. 1, of the Act of 1926, a provision was enacted that where a person has in any trade sustained a loss he may claim that any portion of the loss for which relief has not been given under certain sections of the previous legislation "shall be "carried forward, and, as far as may be, deducted from or "set off against the amount of profits or gains on which he "is assessed under Schedule D in respect of that trade, pro-"fession or vocation for the six following years of assessment." It is on those last few words "for the six following years of "assessment" that this appeal turns.

The question in the case is whether the taxpayer is entitled

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to begin the counting of "the six following years of assessment" not from the year in which he had sustained the loss but from the year of assessment in respect of his tax liability, which was in the year following the year of loss. He had in 1929 made a small loss during the calendar year, which was the accounting period for his assessment for the tax year 1930-31. In the next calendar year, 1930, he had made a larger loss, which would come forward for consideration for the purposes of taxation in the year of assessment 1931-32. Under the specific provisions of s. 29, to which I have referred, the assessment for the year 1931-32 would necessarily be nil.

The taxpayer has contended, and the learned judge below has decided, that the six years referred to in s. 33, sub-s. 1, run not from the year of loss, which was 1930, but from the year 1931-32, which was the tax year of assessment into which that loss in 1930 would come forward for consideration.

The Crown, on the other hand, have contended that the natural meaning of the provision in s. 33, sub-s. 1, is that the six following years are the years of assessment following after the loss, and not the six years which follow after the year in which that loss would come forward for consideration by the taxing authorities and result in an assessment of nil.

That is the very short issue in this case and it depends solely upon the true construction of s. 33, sub-s. 1. In my opinion the learned judge erred in the construction which he adopted, in holding that " the six following years " should be construed as referring to the six years following after the year of assessment in which the loss came up for consideration, which was the next year but one after the year of the loss. That interpretation, in my view, depends upon the tacit introduction into the language of sub-s. 1 of words which are not there. To my mind a perfectly clear meaning can be given to the words actually used as they stand, and if that is so that meaning must be given to them under the ordinary principles of statute interpretation. I see no justification for introducing by implication a reference to the year in which the loss came up for consideration, when the only terminus a quo indicated in the section is the year in which the person has in his trade sustained a loss. The section, in its first two lines begins by referring to that year, and, in my view, to push the six year period forward by introducing before it should begin the year in which the loss came up for consideration is to introduce words into the section which the section does not contain.

Arguments were presented to us by the learned Solicitor-General based upon other provisions of the Income Tax Acts (which are always to be read as a whole), pointing out that the interpretation which I have adopted was one which still left room in certain cases for losses in the next year after the six year period to be brought into account for the benefit of the taxpayer. To my mind those considerations are not truly relevant to the wording of the section, for the section says that the right of carrying a loss forward so as to deduct it or to set it off against the amount of profits or gains is only to be exercised "as far as may be," and those limiting words are important.

The learned Solicitor-General also referred us to s. 19 of the Act of 1932 which bears out the interpretation which I have put upon s. 33 of the Act of 1926; but I do not think it necessary to discuss the value of that corroboration for the purpose of interpretation as, in my opinion, the words of s. 33, sub-s. 1, are in themselves quite clear.

The appeal therefore, in my view, should be allowed.

CLAUSON L.J. I agree.

GODDARD L.J. I agree.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Collyer-Bristow & Co., for D. Granville West, Newbridge, Mon.*

R. F. S.

O'GRADY *v.* M. SAPER, LIMITED.

C. A.
1940
July 2, 3.

Master and servant—Servant employed at weekly wages—Absences from work ill—No wages paid or expected to be paid—Subsequent claim for wages during those periods—Inference of implied term that those wages are not to be paid.

The question whether a servant is or is not entitled to be paid his wages during short periods of absence from work through illness, depends entirely on the terms of the contract which will often require to be ascertained by reference to the facts.

In a case therefore where a servant had been absent from work on three occasions through sickness and he had neither received nor expected to receive wages during those periods, the Court drew the inference that it was an implied term of the contract of employment that he should not be paid wages during such absences from work.

The headnote in *Marrison* v. *Bell* [1939] 2 K. B. 187 is erroneous. There is not, as there stated, a principle of the common law by which the wages of a servant are to continue during the "illness "... which ... incapacitates him from the performance of his "duties, but is not so long continued or so serious as to terminate the contract of service."

The statement of the law by Atkinson J. in *Petrie* v. *Mac Fisheries, Ld.* [1940] 1 K. B. 258, 269 applied.

APPEAL from the order of His Honour Judge Owen Thompson sitting at Bow County Court. On December 7, 1936, the plaintiff, James O'Grady, was employed by the defendants, M. Saper, Ld., of Argall Avenue, Leyton, sugar merchants, as commissionaire at wages of 2*l*. 15*s*. a week, soon afterwards increased to 3*l*. a week. He was absent from his employment ill on three occasions, namely, from May 27 to June 24, 1938, from October 28 to December 30, 1938, and from May 5 to May 18, 1939. He received no wages during his absences ill, but on July 1, 1939, he commenced these proceedings in the county court for the wages during those periods amounting to 45*l*. The defendants set up the defence that the plaintiff was employed on the basis that he was paid 3*l*. a week when he was working and that when he ceased to work through ill-health or for any other reason he received no pay.

In cross-examination the plaintiff said he did not ask for or expect to be paid during his absence ill until he saw "the

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"piece in the paper." By these words he meant a newspaper account of the decision of the Court of Appeal in *Marrison* v. *Bell.* (1)

The county court judge said that the first question was whether there was an express contract under which, in the event of absence through sickness, the plaintiff was to be disentitled to wages. There was no such express condition. The law was well established. As Atkinson J. stated in *Petrie* v. *Mac Fisheries, Ld.* (2), when referring to *Marrison* v. *Bell* (1): "I think the Court of Appeal meant . . . . that where there "is nothing in the contract, expressed or implied, to the "contrary, the consideration for wages is not the actual doing "of the work contracted for, but the readiness and willingness, "if of ability, to do the work." In the absence of written contracts, notices, or oral express contracts, there was no express contract excluding the right to wages during sickness. The second question was whether there was an implied contract. There was no evidence that the plaintiff knew of his right until after he saw in the papers the reference to the case of *Marrison* v. *Bell.* (1) It could not be said that he waived a term in the contract to his own prejudice. He could see nothing to create an implied term. There was therefore no express or implied term to prevent the normal rule from applying and he must decide in favour of the plaintiff.

The defendants appealed. The appeal was heard on July 2, 3, 1940.

R. E. L. Parry for the appellants. The county court judge acted on a wrong interpretation of the law. There was good ground for implying a term in the contract of service by which the servant was not to be paid wages while absent from his work through sickness. In his course of service the man was absent owing to sickness and on none of these occasions did he either receive or expect to receive wages for the time he was away from work. This case is covered by *Petrie* v. *Mac Fisheries, Ld.* (2), where it was laid down that the question must be governed entirely by the terms of the contract.

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(1) [1939] 2 K. B. 187.

(2) [1940] 1 K. B. 258, 270.

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[Luxmoore L.J. referred to *Marrison* v. *Bell.* (1)]

The headnote in that case is erroneous and misled the county court judge. The whole question is what was the bargain between the parties. There is no principle at common law that an employee must be paid during sickness in the absence of an agreement to the contrary. The whole question in every case is what was the agreement between parties and here the only fair inference is that the man was not to be paid during absence from work sick. The appellants rely on that course of dealing between the parties: see *Browning* v. *Crumlin Valley Collieries, Ld.* (2) The undisputed course of conduct here was that no wages were paid during sickness, and as this afforded a good ground for implying a term to that effect in the contract, it is not even necessary to distinguish *Marrison* v. *Bell.* (1)

P. M. Wright (for *H. J. Phillimore,* on war service) for the respondents. The county court judge did in fact apply his mind to the question of what were the terms of the bargain between the parties. The defendants set up an express bargain between the parties but the county court judge rightly decided against. The position was that the plaintiff was employed by defendants at a weekly wage without anything being said about payment or non-payment during times of sickness.

[MacKinnon L.J. The headnote in *Marrison* v. *Bell* (1) was wrong in saying that there is a common law principle applicable. The only question is what was the contract.]

The simple facts here are that the respondent was employed to do certain work at a specified wage.

[Luxmoore L.J. referred to *Warburton* v. *Co-operative Wholesale Society, Ld.* (3)]

That case only decided that a workman incapacitated by illness was not entitled to wages if he was getting sick pay or compensation. That refers to sick pay under a scheme incorporated in the terms of employment, and not to national health benefit: see *Niblett* v. *Midland Ry. Co.* (4) But that case definitely decides that the employment is not determined

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(1) [1939] 2 K. B. 187.
(2) [1926] 1 K. B. 522, 528.
(3) [1917] 1 K. B. 663, 668.
(4) (1907) 96 L. T. 462.

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by short absences from work through illness and that unless he is getting sick pay or workmen's compensation he is entitled to go on receiving his pay unless the right is excluded by the express terms of the contract of employment.

[MACKINNON L.J. The terms may be implied.]

There is nothing here from which a term can be implied that the man is not to be paid during sickness. The whole question is what was the contract between the parties and a subsequent course of conduct cannot be relied on to imply a term: see *Petrie* v. *Mac Fisheries, Ld.* (1) The man was ignorant of his rights and the mere failure to pay him wages during sickness cannot have changed the initial contract.

[No reply was called for.]

MACKINNON L.J. This is an appeal from Bow County Court. In my view it is a disastrous example of the results of the misapplied industry of the compilers of law reports. A decided case is only worthy of report if it decides some principle of law and it is only deserving of citation in a later case if the same principle of law is involved. Unhappily very many cases are reported unnecessarily, and the practice has arisen, in a case involving no principle of law but purely a question of fact, of saying: "Here is a report of another case rather "like this, so please decide it in the same way."

In this case the plaintiff was a commissionaire who had been employed by the defendants to attend to a gate at their works. He was engaged in December, 1936, first at a wage of *2l.* 15*s.* a week and then it was raised to *3l.* a week. He continued in their employment for more than three years. During the time when he was working for them he was away ill for four weeks in 1938, and during his absence he did not receive any wages. Again in 1938, later on, he was away ill for nine weeks and again he was not paid any wages during his absence. In 1939 he was away through illness for two weeks and again he did not receive any wages. He said in his evidence that at these times he never expected to be paid and it never occurred to him that he had any claim for wages

(1) [1940] 1 K. B. 258, 265.

whilst he was not working. Then he went on to say: "Till "I saw the piece in the paper I neither asked for payment "during illness nor expected it." Now the piece in the paper was, one may gather, some journalistic summary of a recent decision in the Court of Appeal in the case of *Marrison* v. *Bell*. (1) Unhappily that is one of the cases which, as I think, was unnecessarily reported and, more unhappily, the headnote of the case—which I cannot think can be justified by anything which was decided by the Court—reads thus: "Illness of a servant, which, while it lasts, incapacitates him "for the performance of his duties, but is not so long-continued or so serious as to terminate the contract of service, "does not at common law suspend his right to wages under "the contract." That, in terms, appears to be a statement of a principle of common law, but it is not and cannot be any statement of any principle of the common law. The whole question in such a case as this is: What were the terms of the contract between the employer and the servant and what did those terms provide in regard to payment of wages to him during his absence from the service by reason of illness? It was rightly said in a later case by Atkinson J. (*Petrie* v. *Mac Fisheries, Ld.* (2)), "The question must depend, as is "indicated in the notes to *Cutter* v. *Powell* (3) (Smith's Leading "Cases, 13th ed., vol. ii., p. 49), on the terms of the contract. "' The right to wages depends upon whether the consideration "' therefor has been performed.' It is submitted in the notes "to that case, as I think rightly, that it must be ascertained "from the contract whether the consideration for the payment "of wages is the actual performance of the work, or whether "the mere readiness and willingness, if of ability to do so, "is the consideration."

Now the sort of contract which is involved is usually concluded orally by people who rarely think out, and still more rarely, express any terms. The whole difficulty in such a case is to ascertain what in truth were the terms of the contract. Where the thing is not expressed it may be that you have to ascertain the terms as a matter of implication, but, in any case, it is a question upon the evidence in the case: What were the terms of the employment? Were they an agreement that the man should be paid when ready and willing to work, or only that he should only be paid when he was actually working? It depends upon the evidence what the terms were. In this case, as it seems to me, there was abundant evidence that the terms, not expressed but no doubt implied, upon which this man was employed were that he should not be paid wages whilst he was sick. The conclusive evidence of that is that on at least three occasions, during the time he had been employed, when he was away sick he was not paid wages, and he acquiesced in that position and, as he said: "Till I saw the piece in the paper I neither asked for payment "during illness nor expected it." As was rightly pointed out by Tucker J. during the discussion, if you are to ascertain what the implied terms are you have got to ask yourself: If somebody had raised the question when they were originally making the bargain what would they both have said about it? What in this case they would both have said about it is best proved, and I think is conclusively proved, by what the parties did when the event arose. When the event arose, and he was away ill, and he was not paid, he acquiesced in it, and, as he said, he did not think he ought to have it; he did not expect to get it. I come without hesitation to the conclusion that the terms of the contract between these parties were that he should be paid not during the period when he was ready and willing to work but only during such period as he did work, and I regard it as most unfortunate that the headnote in *Marrison* v. *Bell* (1) should have purported to state as a principle of common law that a man who is incapacitated through illness is entitled to his wages during that illness. What the results may be I do not know, but this case is not at all a bad example of the effect of that unhappy report filtering down through the ordinary newspapers. It may be that county courts are now being deluged with stale claims by workmen for wages during the periods when in the past six years they were away from work through sickness. The result of that it is easy to imagine; subject to the Statute of Limitations an unhealthy workman might now, if there was any such principle of common law, claim for frequent periods of absence through illness during six years, and if that was the rule of common law the employer would have no answer to the claim. Whereas, obviously, if any such claim had been made on the first occasion when he was ill at the beginning of the six years and the man had said: "I ought to be paid although I was "away sick," the employer would have said: "Good "gracious, if that is your idea of the terms of your engagement "it is not mine, and you will take a week's notice to end our "contract." The learned judge, misled, as I think, and perhaps very reasonably misled, by the headnote in *Marrison* v. *Bell* (1), said: "In the absence of evidence as to "what were the terms agreed when the man was engaged "in 1936 in my view there was no express and no implied "term to prevent the normal rule applying." I understand that to mean that he accepted as the normal rule of common law that which is stated in that misleading case. It is nothing of the sort; it is a pure question of fact in every case. In this one I am quite satisfied that the agreement was that he should not be paid during illness and that therefore the claim ought to have been dismissed.

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(1) [1939] 2 K. B. 187.
(2) [1940] 1 K. B. 258, 269.
(3) (1795) 6 T. R. 320.

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(1) [1939] 2 K. B. 187.

As a result I think the appeal should be allowed and judgment entered for the defendants with costs here and below.

LUXMOORE L.J. I agree.

TUCKER J. I agree.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker; J. H. Fellowes.*

H. C. G.

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(1) [1939] 2 K. B. 187.

Applied. MINT *v.* GOOD [1951] 1 K. B. 517

Applied. MINT *v.* GOOD. [1950] 2 All E.R. 1159.

C. A.

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July 4.

HEAP *v.* IND COOPE AND ALLSOPP, LIMITED.

Landlord and tenant—No covenant to do external repairs—Landlords' right to enter and view the premises and effect repairs—Landlords' practice to do all repairs—Accident to third party on highway through want of repair of cellar cover—Action against landlords for damages for personal injury—Negligence—Liability of landlords.

In order that a person injured while proceeding along a highway by the defective condition of premises alongside it may be entitled to sue the landlord instead of the occupying tenant for personal injuries, it is not necessary that the landlord should have covenanted with the tenant to do the external repairs; it is sufficient that he has reserved the right to enter on and view the premises and to do all necessary repairs.

So held by the Court of Appeal (MacKinnon and Luxmoore L.JJ. and Tucker J.).

The decision of Goddard J. in *Wilchick* v. *Marks and Silverstone* [1934] 2 K. B. 56 as qualified in *Wringe* v. *Cohen* [1940] 1 K. B. 229 approved and followed.

APPEAL from His Honour Judge Caporn sitting at Walsall County Court.

By a lease dated June 21, 1935, the Lichfield Brewery Co., Ld., demised to the defendants Ind Coope and Allsopp, Ld., the licensed premises known as the Victoria Inn, 23, Lower Rushall Street, Walsall, for the term of twenty-one years from July 1, 1935, at the rent therein mentioned. The lease contained full repairing covenants by the defendants. By an agreement in writing dated August 1, 1935, the defendants let the same premises to one Poxon on a yearly tenancy commencing from July 1, 1935, at the rent of 33*l*. 16s. per annum. The agreement contained a covenant by the tenant to keep the interior of the premises in good clean and tenantable repair and condition (damage by fire excepted) and so to deliver up the premises at the termination of the tenancy. The agreement also contained a provision that the tenant should permit the defendants' agents or any person authorized by them to enter upon the premises for the purpose of viewing the condition thereof and at the tenant's own expense make good all defects and wants of reparation therein within one calendar month after notice thereof. The agreement contained no covenant by the defendants to do the outside repairs but in fact the defendants made a practice of doing both the inside and outside repairs at their own expense.

Included in the premises was a vault cellar with a light shaft cover set into the pavement on a highway known as Intown Row, Walsall. At about 9.45 P.M. on April 4, 1938, the plaintiff, William John Heap, who was a master locksmith resident in Lower Rushall Street, was walking along the pavement of Intown Row and was passing over the light shaft cover when it collapsed with the result that he fell through into the cellar and suffered serious injuries.

On February 12, 1940, the plaintiff commenced proceedings in the High Court against the defendants for damages for personal injury caused by their negligence in allowing the light shaft cover to be in such a condition that it collapsed when he walked over it. The action was subsequently transferred to the county court.

At the hearing before the county court judge evidence was given by Ernest Charles Thompson, a builder's clerk, that about twelve months previously they had inserted a wooden block in the light shaft cover in place of a broken pane of glass and had to hammer the wood in. Such a light should be supported down the sides to be reasonably safe. Mr. Alfred Hurst an expert witness said he had seen the cover after the accident. The plaintiff's weight could not have broken it. Hammering in a wooden block might cause a breakage. Such a light should be supported at the ends and side. If inspected from underneath it should be seen if the sides were not supported. If ten months earlier a heavy lorry had gone over the cover that might have caused a crack in it. Mr. Poxon said that a supervisor came every week from the defendants to view the premises and if repairs were necessary they did them and paid for them. He had detected nothing wrong with the cover. Probably two hundred people had gone over it on the day the plaintiff met with his accident. Lorries went over the pavement to get into the street and sometimes went across the cover. He had been in the cellar several times that week and the cover was supported at the sides.

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The county court judge in giving judgment said he had come to the conclusion that the Court of Appeal had laid it down in *Wringe* v. *Cohen* (1) that if in fact the landlord had undertaken to do the repairs then he and not the tenant or occupier was responsible if a member of the public was injured while exercising his rights on the highway, through failure to keep the premises in proper repair. In his opinion this sufficed to cover the present case and the defendants could not succeed in their contention that it was the tenant who was liable having regard to their definite obligation under the head lease. There was nothing in the agreement with the tenant providing for the outside repairs to be done but within a week of entering into that agreement the defendants' supervisor commenced visiting the premises for the purpose of inspecting them and having any defects in the structure or interior made good at the expense of the defendants. They had clearly undertaken as between themselves and the tenant to do the exterior repairs and they were clearly responsible for keeping the premises in a proper state. Relying upon their undertaking, Poxon had left it to the supervisor to ascertain what was necessary for the defendants to fulfil their structural obligations and to keep the premises in a proper condition to satisfy their obligation to passers by and invitees.

It seemed to him that the real effective cause of the accident was that the defendants, even as volunteers, accepted the responsibility of replacing a glass with wood, and did not exercise reasonable care and skill in doing it. There was negligence also in failing to inspect the cover from time to time. On these grounds there would be judgment in favour of the plaintiff for 500*l.* damages and costs.

The defendants appealed. The appeal was heard on July 4, 1940. The only question calling for report is whether the plaintiff could properly sue the defendants or ought to have sued the tenant Poxon for damages.

D. M. Rosenberg for the appellants. The county court judge was wrong in holding the defendants to be liable. The tenant is

(1) [1940] 1 K. B. 229.

always the person responsible to a person injured whilst walking along the highway owing to some lack of repair in the premises occupied by him. It is only when the landlord has covenanted to do the external repairs that proceedings can be brought directly against him to avoid circuity of proceedings: *Nelson* v. *Liverpool Brewery Co.* (1) A custom or practice of the landlord to do the repairs is not enough, he must be under a covenant to the tenant to do them: *Wringe* v. *Cohen* (2), where *Nelson's* case (1) was noted without disapproval. *Payne* v. *Rogers* (3) makes it clear that there must be an obligation to repair undertaken by the landlord to the tenant: see also *Wilchick* v. *Marks and Silverstone* (4) which was only disapproved in *Wringe* v. *Cohen* (2) so far as there was stated to be a need for notice of a disrepair.

[LUXMOORE L.J. The landlords were held liable in *Wilchick's* case (4) because they had been in the habit of repairing the demised premises and had reserved to themselves the right to enter on the premises.]

That reservation was part of the tenancy agreement.

The landlords must be under a covenant with the tenant to do the repairs.

[TUCKER J. Is not the position here very similar to that in *Wilchick* v. *Marks and Silverstone* (4) ?]

In so far as that case departed from the view that there must be a covenant, it is wrong. The Court of Appeal in *Wringe* v. *Cohen* (2) could not have approved the principle laid down in *Nelson's* case (1) and *Payne* v. *Rogers* (3) and yet have approved what was said by Goddard J. in *Wilchick* v. *Marks and Silverstone*. (4) *Wilchick's* case (4) went beyond any of the other authorities. Further, the right reserved here in the tenancy agreement to enter and view was not for the purpose of making good external repairs but only the internal repairs at the tenant's expense.

W. L. James (*A. J. Flint* with him) for the respondent. It is not necessary to prove an actual covenant by the landlord with the tenant to do the outside repairs. It is sufficient if

(1) (1877) 2 C. P. D. 311.
(2) [1940] 1 K. B. 229.
(3) (1794) 2 H. Bl. 350.
(4) [1934] 2 K. B. 56.

the obligation remains in the landlord or if he has himself taken upon him the obligation of doing the repairs. In this case the appellants had entered into a full repairing covenant with the freeholders. The position in such a case where the underlease contains no covenant to do outside repairs has not been considered before. In such a case the tenant could clearly obtain relief from forfeiture if the landlord failed to do the repairs and although the tenant would have then to do the repairs he would have a remedy against the sublessor under the covenant for quiet enjoyment.

MACKINNON L.J. This is an appeal from a judgment of the Walsall County Court judge. On April 4, 1938, the plaintiff Mr. Heap, who keeps a shop in Walsall, was going to a public house called the Victoria Inn. As he approached it, he had to cross over the cellar flap. It had glass lights in it, and, as he stepped on that structure, it gave way beneath him and he fell into the cellar and sustained serious injuries. It is perfectly obvious, in those circumstances, that he had a claim against somebody. He went to a firm of solicitors to act for him to recover compensation, which the learned county court judge assessed eventually at the sum of 500*l*.

The public-house was a tied house. The brewer landlords were Messrs. Ind Coope & Co. The tenant was a Mr. Poxon. The solicitors wrote first of all to Messrs. Ind Coope & Co. making a claim on behalf of Mr. Heap. Their application to that company was answered by the Licenses and General Insurance Company, Ld., who said, in effect: "You are "making a claim on the wrong people. The landlords are "not liable. You ought to claim on the tenant." The solicitors a short time afterwards did write and make a claim on Mr. Poxon, the tenant. Thereupon the firm of solicitors representing the tenant wrote back and said: "You are claiming on the wrong man. You ought not to "claim on us. You ought to claim on the landlords, Ind "Coope & Co., and if you issue a writ against us we shall "bring them in as third parties." In those circumstances I am a little surprised that Mr. Heap's solicitors did not sue both of them, because, when each of them was saying: "No, I am not liable but the other is," it is quite clear that he would be safe in his ultimate claim for costs under the principle of *Bullock* v. *London General Omnibus Co.* (1) However, after considering the matter and I suppose having in mind the fact that Messrs. Ind Coope & Co. were more opulent than Mr. Poxon, the solicitors eventually pressed their claim against Messrs. Ind Coope & Co. The solicitors on behalf of the Insurance Company then raised another point. They said: "Well anyway, we are not liable because "we are not the freeholders. We are only tenants under a "lease from the freeholders who are the Lichfield Brewery "Co., Ld." That added a possible third defendant. Eventually the writ in this action in the King's Bench Division was issued against Ind Coope and Allsopp, Ld., the tied house brewers. Under some order, which I have not seen, the case was, apparently, remitted to the county court at Walsall. The position was that the Victoria Inn was the freehold property of the Lichfield Brewery Co., Ld. That is a legal distinction, though I understand that in fact it has very little substance in it, because I gather that the bulk of the shares in the Lichfield Brewery Co., Ld., are held by the defendants, Ind Coope and Allsopp, Ld. There was a lease between the Lichfield Brewery Co., Ld., and Ind Coope and Allsopp, Ld. Under that the tenants, Ind Coope & Co., covenanted with the freeholders that they would from time to time and at all times keep the premises in a good and tenantable state of repair and condition. Having become tenants of the house under that lease of June 21, 1935, from the Lichfield Brewery Co., Ld., Ind Coope and Allsopp, Ld., granted a lease to Mr. Poxon on August 1, 1935. Under that lease the covenants as to repair were these: Mr. Poxon undertook to keep the interior of the premises in decorative repair, but he undertook no obligation as regards the exterior of the premises. There was no covenant by the landlords that they would keep the premises externally or structually in repair, but it was part of the lessee's (Mr. Poxon's)

(1) [1907] 1 K. B. 264.

covenants that he would permit the agents of the company, or any person authorized by them, to enter upon the premises at any time and at all reasonable times for the purpose of viewing the state of the premises, and, at the tenant's own expense, make good all defects and want of reparations therein—those, of course, being such defects and want of reparations as by his previous covenant he had undertaken to remedy—and to bring their agents, servants, and so forth, upon the premises. The evidence was that in fact Messrs. Ind Coope & Co., having that liberty to come upon the premises and repair them, have from time to time carried out all necessary repairs (as they were bound to do under their lease from the Lichfield Co.), and indeed they had some time before executed some small repairs to this cellar flap. When a glass section of it had been broken, they had had it repaired by putting in a wooden substitute.

Those being the terms under which the defendants were tenants from the Lichfield Brewery Co. and Mr. Poxon was tenant from them, the question arises whether the plaintiff (who, as I have said previously, obviously ought to recover his damages from somebody) has made a technical mistake in suing Ind Coope and Allsopp, Ld., instead of suing Mr. Poxon. It is argued by Mr. Rosenberg that he has done so, and that, although he had an irrefragable claim against Mr. Poxon, he is technically wrong because he has made that claim against Ind Coope & Co. Our attention has been called to a number of cases. Mr. Rosenberg says that in such a case as this prima facie the occupier is liable, but that his landlord may be liable only in one event, namely, if the landlord has covenanted to do the repairs the lack of which has caused the damage to the plaintiff. He says that the ground for that exception to the rule that the occupier alone is liable is to avoid circuity of action. For if the occupier was made liable he would have in turn a claim over against the landlord for breach of his covenant to repair, and, therefore, an injured person can sue the landlord direct. He therefore argues that as there is no covenant to repair by Ind Coope & Co. as towards Mr. Poxon in this case, the exception to the rule does not apply, and Mr. Heap has made a mistake and sued the wrong party.

There are other cases, in some of which some members of this Court have been previously concerned, and some discussion as to how far those decisions go and what is the precise effect of them is no doubt possible. So far as I am concerned, I freely avow that, inasmuch as in common-sense and decency Mr. Heap ought to be able to recover against somebody, and in the circumstances of this case and having regard to the correspondence which has taken place in common-sense and decency he ought to recover against these defendants if the law allows it, my only concern is to see whether upon the cases the law does allow him so to recover. I think that it does. It was held by Goddard J. (as he then was) in *Wilchick* v. *Marks and Silverstone* (1) that, where a third party has been injured by the lack of repair of a house, and the landlords had not covenanted to do the repairs but had reserved a right to enter and do the repairs if they thought fit, that was sufficient to give the third party who had been damaged a direct right of action against the landlord, and he was not limited to a right against the occupier. Goddard J. added a proviso to that suggested rule of liability, that it could only arise in a case where the landlord knew, or had notice, of the defect or lack of repair in the property in question. That qualification or condition, that the landlord must know that repairs are wanted or that the defect is existing, has, I think, been said to be incorrect in the later case of *Wringe* v. *Cohen*. (2) If that qualification is taken away, then the decision of Goddard J. (otherwise, I think, approved in this Court) seems to me to cover the position of Messrs. Ind Coope and Allsopp, Ld., in the present case. Goddard J. said this (3): "If I use a highway the duty I am "under not to injure other persons is not special or contractual, "but general, arising from what Lord Esher used to call "proximity. A property owner knows that his house if not "repaired must at some time get into a dangerous state: he

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(1) [1934] 2 K. B. 56.
(2) [1940] 1 K. B. 229.
(3) [1934] 2 K. B. 56, 67.

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"lets it to a tenant and puts him under no obligation to keep "it repaired: it may be the tenant is one who from lack of "means could not do any repairs. The landlord has expressly "reserved to himself the right to enter and do necessary "repairs: why then should he be under no duty to make it "safe for passers by when he knows that the property is "dangerous? The proximity is there: he has the right to "enter and remedy a known danger. Is the injured person "to be left in such a case only to a remedy against the tenant?" That passage, in view of the later expression of opinion in *Wringe* v. *Cohen* (1), has to be read omitting the words which I read: "When he knows that the property is dangerous." If you omit those words, that statement of the learned judge exactly covers the position in this case. "The landlord has expressly "reserved to himself the right to enter and do necessary "repairs: why then should he be under no duty to make it "safe for passers by?"—like Mr. Heap—"The proximity is "there: he had the right to enter and remedy a danger. Is "the injured person to be left in such a case only to a remedy "against the tenant?"

Upon those grounds I think that the law as it stands does permit me to give effect to common-sense and decency and to say that this decision of the learned county court judge was correct, and that the judgment against the defendants should stand.

Luxmoore L.J. I agree.

Tucker J. I agree.

Appeal dismissed.

Solicitors: *S. Rutter & Co.; Peacock & Goddard, for Ernest W. Haden & Stretton, Walsall.*

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(1) [1940] 1 K. B. 229.

H. C. G.

ATTORNEY-GENERAL *v.* OLDHAM.

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July 4.

Revenue—Estate duty—Gift inter vivos—Shares in company—Subsequent issue of bonus shares—Death of donor less than three years after gift—Duty not payable on value of bonus shares—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*c*) ; *s.* 22, *sub-s.* 1 (*f*).

In January, 1934, T. gave to the defendant 25,000 shares in a company. In May, 1935, the company increased its capital by the issue to the shareholders of bonus shares, fully paid out of the company's reserves, in the proportion of two bonus shares for every five existing shares. Ten thousand bonus shares were accordingly allotted to the defendant. In April, 1936, T. died, and the Crown claimed estate duty on the value of the 10,000 bonus shares as well as on the 25,000 original shares (on which it was admittedly chargeable) :—

Held, that the bonus shares were not property passing under the disposition made by T., and, therefore, estate duty was not chargeable on their value.

Decision of Wrottesley J. [1940] 1 K. B. 599 affirmed.

APPEAL from a decision of Wrottesley J. (1)

By an English information the Attorney-General sought to recover estate duty claimed on the death of George Booth Tate in respect of certain shares as property comprised in a voluntary disposition made by him less than three years before his death.

On January 26, 1934, Mr. Tate transferred to the defendant, Mrs. Jane Marjorie Oldham, his daughter, by way of gift, 25,000 ordinary shares of 1*l.* each in Tate and Lyle, Ld. (" the company "). At that date the company's capital was 4,500,000*l.*, divided into 3,400,000 ordinary shares of 1*l.* each and 1,100,000 6½ per cent. preference shares of 1*l.* each, all of which had been issued. In the 1933 balance sheet the general reserve amounted to 1,500,000*l.*, and in the 1934 balance sheet that figure was increased to 1,650,000*l.* On May 9, 1935, the company in general meeting resolved that the capital of the company be increased to 6,200,000*l.* by the creation of 1,700,000 new ordinary shares of 1*l.* each, that 1,360,000*l.* of the general reserve be capitalized and applied in paying up 1,360,000 of the new shares, and that those

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(1) [1940] 1 K. B. 599.

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shares be distributed among the holders of the ordinary shares in the proportion of two such shares for every five shares held. Pursuant to those resolutions the company allotted 10,000 ordinary shares of 1*l.* each, credited as fully paid, to the defendant. Mr. Tate died on April 30, 1936, less than three years after the transfer of the original 25,000 shares to the defendant.

The Stock Exchange prices of the ordinary shares were quoted in the Official List on the material dates as follows :—

Jan. 26, 1934	$4\frac{1}{16}$—$4\frac{3}{16}$
May 8, 1935	$5\frac{7}{16}$—$5\frac{9}{16}$
May 10, 1935	$3\frac{13}{16}$—$3\frac{15}{16}$
April 30, 1936	$4\frac{13}{32}$—$4\frac{15}{32}$

The Commissioners of Inland Revenue claimed that estate duty became payable at the appropriate rate under s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881 (as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and s. 59, sub-s. 1, of the Finance (1909–10) Act, 1910), and s. 2, sub-s. 1 (*c*), of the Finance Act, 1894 (1),

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(1) By s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as amended (so far as material) by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and s. 59, sub-s. 1, of the Finance (1909–10) Act, 1910: "The personal or moveable property to be included in an "account shall be property of the "following descriptions, viz. :— "(*a*) Any property . . . . taken "under a voluntary disposition, "made by any person . . . . purporting to operate as an imme"diate gift inter vivos whether by "way of transfer, delivery, de"claration of trust or otherwise, "which shall not have been bonâ "fide made three years before the "death of the deceased."

By s. 1 of the Finance Act, 1894: "In the case of every "person dying after the com"mencement of this Part of this "Act, there shall, save as herein"after expressly provided, be "levied and paid, upon the princi"pal value ascertained as herein"after provided of all property, "real or personal, settled or not "settled, which passes on the "death of such person a duty "called 'Estate duty' . . . ."

Sect. 2, sub-s. 1: "Property "passing on the death of the "deceased shall be deemed to "include the property following, "that is to say :— . . . . (*c*) "Property which would be re"quired on the death of the "deceased to be included in an "account under s. 38 of the "Customs and Inland Revenue "Act, 1881, as amended by s. 11 "of the Customs and Inland "Revenue Act, 1889, if those "sections were herein enacted and "extended to real property as "well as personal property, and in respect alike of the 25,000 original shares and of the 10,000 bonus shares allotted to the defendant. The defendant admitted that duty was payable in respect of the original 25,000 shares, but she denied that it was payable in respect of the bonus shares. The informant asked for a declaration that duty was payable on the whole 35,000 shares and for an account and payment thereof.

Wrottesley J. held that the bonus shares were not property passing under the disposition made by Mr. Tate, and that, therefore, estate duty was not chargeable on their value.

The Crown appealed. The appeal was heard on July 4, 1940.

Sir Donald Somervell A.-G. and *J. H. Stamp* for the Crown. The Attorney-General is entitled to the declaration claimed. The substance of the gift must be regarded and not merely the form. While there was a change in the form in which the defendant's rights as a shareholder were couched, there was no change in the substance. On May 8, 1935, the mean price of five ordinary shares was 27½. On May 10 the mean price of the equivalent holding of seven shares, after the allotment of bonus shares, was 27⅛. The new shares did not give the donor an immediate right to a larger amount of the existing assets, nor did they affect the proportions to which the shareholders were entitled in the undertaking or in any profits, nor did the transaction take anything out of the company's coffers and put anything into the shareholders' pockets: *Inland Revenue Commissioners* v. *Blott*, per Viscount Haldane, Viscount Finlay, and Viscount Cave. (1) "Property" in s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, must in such a case as the present include what Warrington L.J., in *In re Speir. Holt* v. *Speir* (2), described as "an

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"the words 'voluntary' and "'voluntarily' and a reference to "a 'volunteer' were omitted "therefrom."

By s. 22, sub-s. 1 (*f*): "The ex-"pression 'property' includes real "property and personal property "and the proceeds of sale thereof "respectively and any money or "investment for the time being "representing the proceeds of "sale."

(1) [1921] 2 A. C. 171, 184, 192, 200.

(2) [1924] 1 Ch. 359, 370.

"accretion to the original . . . . shares." Here the bonus shares grew out of the original shares and the defendant acquired her title to them under the original gift. Where property is changed in form in a way which arises out of its inherent nature, it can be followed into its changed form for the purposes of estate duty. The principle to be applied is similar to that in *In re Leeming. Turner* v. *Leeming* (1), where substituted shares in a reconstructed company were held to pass under a bequest of original shares in the company before reconstruction, although the test in a case of ademption is stricter than is necessary here. *In re Kuypers. Kuypers* v. *Kuypers* (2) is distinguishable because there the identity of the original shares had been completely lost. The position here is the same as in *In re Payne. Poplett* v. *Attorney-General.* (3) True that that was the case of a settlement, but that makes no difference because s. 38, sub-s. 2, of the Act of 1881, and s. 1 of the Finance Act, 1894, extend to cover both settled property and a gift passing by transfer or delivery. The terms of the Death Duties (Killed in War) Act, 1914, show that a very wide meaning is to be given to " property " in the Act of 1881 and the Finance Act, 1894.

R. F. Roxburgh K.C. and *F. Heyworth Talbot* were not called on to argue.

SCOTT L.J. The Court have listened very carefully to the arguments of the Attorney-General and Mr. Stamp, but we are not satisfied that there is any reason for disturbing the judgment of the Court below.

The appeal raises the question whether bonus shares allotted to the defendant, who was a donee from her father of certain shares in the company which made the allotment, are to be included in the shares so given as a part of the property which, under s. 2, sub-s. 1, of the Finance Act, 1894, and s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, is to be deemed to have passed on his death which occurred within three years of the gift of the original shares. That

(1) [1912] 1 Ch. 828.
(2) [1925] Ch. 244.
(3) [1940] 1 Ch. 576.

question turns on the meaning of the word "property" in s. 38, sub-s. 2 (*a*), of the Act of 1881. Wrottesley J. delivered a very careful judgment in which he came to the conclusion that it was impossible to say on the interpretation of the statute, even applying the rule that the Court must look at the substance, and not merely at the form, of the transaction, that the bonus shares in question in the circumstances of this case came within the "property" which was the subject of the gift, namely, the original shares.

I agree with the reasoning of Wrottesley J., and I do not feel that I can add anything to its cogency. I adopt his judgment as my own and I think that the appeal should be dismissed.

Clauson L.J. I agree. The 25,000 shares given to the defendant by her father remained at the date of the father's death in being in her hands and wholly unchanged. Accordingly, there is no difficulty in identifying the subject-matter of the gift. It is true that between the time of the gift and that of the father's death the defendant, by virtue of her shareholding, acquired some further shares, but they were not the subject-matter of the gift.

We have had a very interesting discussion about possible cases in which the subject-matter of a gift no longer exists at the date of the death in the form in which it was at the time of the gift. Our attention has been drawn to possible cases which might involve a number of interesting and difficult points with regard to the identification of the subject-matter of a gift with something which exists at the date of the death, but those points do not arise where the original subject-matter of a gift remains unaltered. In my judgment, it is unnecessary for the purposes of this case to form any view on such possible cases. So far as the present case is concerned, I can see no answer to the reasoning contained in the last paragraph of the judgment of Wrottesley J. If it had been to the defendant's interest to contend that her father had given her the bonus shares, she could not truthfully have sworn that she had

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received them from him. I, therefore, agree that the appeal must be dismissed.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Pennefather & Co.*

G. F. L. B.

BOARLAND (INSPECTOR OF TAXES) *v.* PIRIE, APPLETON AND COMPANY, LIMITED.

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July 1.

STEMCO, LIMITED *v.* HYETT (INSPECTOR OF TAXES).

Revenue—Income tax—Mills and factories—Deduction to owners in respect of depreciation—Tenants to be treated as owners if " whole " of the burden of any depreciation falls upon " them—Tenants under strict covenants to repair—" Whole of the burden "—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 15, *sub-ss.* 1, 5.

By s. 15, sub-s. 1, of the Finance Act, 1937, an owner of a mill or factory, in computing profits and gains under Sch. D to the Income Tax Acts, is entitled to a deduction in respect of depreciation of the premises. By sub-s. 5 the tenant of the premises is to be treated as the owner for this purpose if, under his covenants to repair, the " whole of the burden of any " depreciation of the premises falls upon him."

The tenants of a factory entered into strict covenants to repair in common form, but did not covenant to be liable for such depreciation as would arise, e.g., from decay and lapse of time :—

Held, by the Court of Appeal, that the above covenants would not include the whole burden of depreciation ; that the words of sub-s. 5 must be given their ordinary meaning, and that as the tenants, on that interpretation, were not liable for the " whole " of the burden of any depreciation " within the meaning of the sub-section, they were not entitled to be treated as owners.

Judgment of Wrottesley J. [1940] 1 K. B. 841 affirmed.

APPEALS from the judgment of Wrottesley J. on cases stated by the Special Commissioners of Income Tax.

The proceedings at the hearing before Wrottesley J. are reported at length in [1940] 1 K. B. 841–849, where the substance of the special cases, the relevant statutory provisions, the arguments of counsel on both sides, and the judgment of the learned judge in favour of the Crown, are set out at length.

Against that judgment Messrs. Pirie, Appleton & Co., Ld., and Messrs. Stemco, Ld., gave notices of appeal to the Court of Appeal. The appeal was heard on July 1, 1940.

F. Grant (for *F. N. Bucher*, on war service), for both appellants, repeated in substance the arguments that had been advanced on their behalf in the Court below.

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Sir W. Jowitt S.-G. and *R. P. Hills* for the Crown, were not called upon to argue.

SCOTT L.J. In my opinion the decision of Wrottesley J., and the reasons on which it is founded are right, and these appeals should therefore be dismissed with costs.

CLAUSON L.J. I agree.

GODDARD L.J. I agree.

Appeals dismissed.

Solicitors for the appellants, Pirie, Appleton & Co., Ld.: *Richards, Butler & Co.*

Solicitors for the appellants, Stemco, Ld.: *Piesse & Sons.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

J. R.

BARKING RATING AUTHORITY *v.* CENTRAL ELECTRICITY BOARD.

C. A.

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June 26, 27, 28; *July* 5.

Rates—Electricity supply undertaking—Valuation of hereditaments—Profits basis—Special circumstances—Matters occurring after making of rate or valuation list inadmissible in evidence.

It is a rule of law that the rating of a public utility undertaking with hereditaments in a number of different rating areas must proceed upon the "profits basis" laid down in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* [1926] A. C. 331, unless there are special circumstances rendering the application of that principle impossible. The profits basis has to be calculated on the profits ascertained down to the latest period before the date of the rate or the making of the valuation list, as the case may be, and evidence as to events subsequent to that date is irrelevant.

Quaere, whether the question whether any special circumstances exist, necessitating the exclusion of the profits basis, is one of fact or law.

Decision of the Divisional Court, ante, p. 51, affirmed.

APPEAL from the decision of the Divisional Court (1) on a case stated by Essex Quarter Sessions under the Rating and Valuation Act, 1925, s. 31, sub-s. 5.

The Divisional Court dismissed the appeal of the Barking Rating Authority from a decision of Essex Quarter Sessions that the correct basis of assessment of hereditaments of the Central Electricity Board in the Borough of Barking was the profits basis, and that no special circumstances existed to justify the exclusion of that principle. Quarter sessions excluded evidence of the Board's profits subsequent to the making of the relevant valuation list on April 1, 1934, and the Divisional Court held that they were right in so doing. The rating authority appealed. The appeal was heard on June 26, 27, 28, 1940.

The case stated is set out in the report below (1) and the facts are concisely stated in the judgment of the Court of Appeal.

S. G. Turner K.C. (for *Trustram Eve K.C.*, on war service), and *Scott Henderson* for the appellants.

Craig Henderson K.C. and *Erskine Simes* for the respondents.

Cur. adv. vult.

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(1) Ante, p. 51.

1940. July 5. The judgment of the Court (SCOTT, CLAUSON and GODDARD L.JJ.) was read by GODDARD L.J. This appeal is brought from a decision of the Divisional Court which, on a special case stated by the Essex Quarter Sessions under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, answered the questions submitted in the case in favour of the respondents, thereby upholding the decision of quarter sessions.

The respondents are a statutory body established under the Electricity (Supply) Act, 1926, for the purpose of distributing electricity to all parts of Great Britain by means of a network of transmission cables commonly known as the grid. They do not themselves generate current, but buy it in bulk from other undertakings and transform the voltage at various stations before transmission.

From certain stations known as selected stations the Board may buy the whole output and resell to the owners as much as they require for their own distribution and this current would not pass through or over the Board's stations or lines.

For the purpose of this operation, Great Britain is divided into areas, Barking being in the south-eastern area, and the Board's activities in the areas came into operation from time to time as the plant was developed and became available.

During the period of development, the Board had the right to borrow to pay interest on their issued capital and by s. 11 of the Act they were required to fix a tariff so that over a period of years their receipts should be sufficient to cover their expenditure on income account. This term as fixed by the Electricity Commissioners was in the majority of cases ten years, though for some areas a shorter term was prescribed.

There are a variety of other provisions in the Act as to the Board's trading which are set out in the special case, but to which we need not refer in detail for the purpose of this judgment.

The hereditament now in question consists of a transformer station and certain cables, transmission towers and wires and their valuation was the subject of proposals and objections before the Southern Essex Assessment Committee for the year commencing April 1, 1934.

At the hearing before the assessment committee, the appellants proposed a valuation of 8436*l.* and the respondents contended that the proper valuation was nil, but offered to accept a recommendation of the central valuation committee for a valuation of 2100*l.* for the year beginning on April 1, 1934.

The respondents contended, as they have done throughout, that the proper basis of assessment was what is known as the "profits basis." If that basis is adopted, it is not disputed that the valuation would be nil.

The assessment committee appear to have accepted the respondents' contention, but, in consequence of their offer to accept a figure of 2100*l.* they fixed that sum and it was against that valuation that the rating authority appealed to quarter sessions. There was no cross-appeal and, on the hearing, quarter sessions held that the proper basis was the profits basis and that the true valuation was nil, but, as there was no cross-appeal, they upheld the decision of the assessment committee and dismissed the appeal.

It was stated before us that quarter sessions held that they were bound to adopt the profits basis by reason of the decision of the House of Lords in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1), and we approach this case, as did the Divisional Court, on the footing that quarter sessions did so hold. Since that decision, in our opinion, it must be regarded as a rule of rating law that, in the case of a public utility undertaking whose operations extend over areas beyond the limits of an individual parish, the profits basis is the only method to be applied in fixing the value in any particular parish, unless there are some special circumstances which render that method impossible of application.

We need not in this judgment set out the theory on which this basis is founded. It has been applied ever since the judgment of the Queen's Bench in *Reg.* v. *Mile End Old Town Overseers* (2), followed by *Reg.* v. *West Middlesex Water Works Company* (3) and is fully explained by Lord

(1) [1926] A. C. 331.
(2) (1847) 10 Q. B. 208.
(3) (1859) 1 E. & E. 716.

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Hailsham L.C. in *Railway Assessment Authority* v. *Southern Railway Co.* (1)

Mr. Turner, for the appellants, however, contended that, because of the special rights and duties conferred by the statute on the respondents, they were so different from those undertakers to whose hereditaments the doctrine had been hitherto applied as to make it wholly inapplicable in this case.

With this we cannot agree. They are eminently a public utility corporation and a profit making corporation and the only difference between their undertaking and that of the Metropolitan Water Board or any other like concern for rating purposes is that the total ambit of their areas of supply is far greater, which, indeed, would seem to be all the more reason why the doctrine should apply to their hereditaments.

It was further contended that, if the doctrine did apply, the circumstances set out in detail in para. 14 of the case were sufficiently special to render the doctrine inapplicable to their undertaking.

Both Lord Cave in the *Kingston* case (2) and Lord Hailsham L.C. in the *Southern Railway* case (3) said that there might be special circumstances which would render the doctrine inapplicable, though no indication was given in either case as to what circumstances would or might be sufficient; but we are satisfied that there are none here and, as we agree entirely with the reasons given by the Divisional Court in their detailed examination of para. 14 of the special case, we do not propose to repeat the reasons they gave. It is unnecessary to decide whether what constitutes a circumstance sufficiently special to make the profits basis inapplicable is a question of fact, as was held by the Divisional Court, or is one of law and on this point we reserve our opinion.

The other question raised by the case is whether the estimates of the Board subsequent to 1934 were rightly excluded by quarter sessions.

It appears that the appellants called for these documents and that the respondents objected to produce them on two grounds: first, that they could not be obliged to produce the estimates as they were private material and that a ratepayer is not obliged to produce his private papers for the purpose of enabling the rateable value to be ascertained and, second, that in any case only the accounts down to April 1, 1934, were relevant.

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(1) [1936] A. C. 266, 275.
(2) [1926] A. C. 331, 345.
(3) [1936] A. C. 266, 282.

As quarter sessions expressed the opinion that accounts down to April 1, 1934, were relevant, the respondents produced the accounts for the whole of 1933 and 1934. They could not show accounts only to April 1, as their financial year ended on December 31.

In our opinion, it is settled by the two cases in the House of Lords to which we have already referred that the profits basis has to be calculated not on what may happen in the future, but on the profits ascertained down to the latest period before the date of the rate or, in this case, the preparation of the valuation list and, therefore, the quarter sessions were right in excluding evidence as to events subsequent to 1934 as being irrelevant. The accounts to April 1, 1934, were relevant and those subsequent to that date were irrelevant. Moreover, as it was conceded that the respondents could not have been obliged to produce and did not produce the estimates for subsequent years, the question whether they contained anything relevant or irrelevant does not arise. They were not in evidence and the respondents were entitled to take the objection that they were private documents and exempt from production and it follows that the appellants were not entitled to cross-examine the respondents' witnesses to find out the contents of existing documents which were in effect privileged. On this matter also we agree with the Divisional Court.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Lees & Co.*, agents for the *Town Clerk, Barking.*

Solicitor for the respondents: *Richard H. Fox.*

J. W. H.

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June 27.

SMART BROTHERS, LIMITED *v.* PRATT AND ANOTHER.

Hire purchase—Payments under agreement in arrear—More than one-third of total price paid—Notice by letter requesting the surrender of the goods—Locus pœnitentiæ of four days for paying arrears—Arrears not paid—Action to recover possession—Validity of notice—Hire Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53) *ss.* 10, 11.

Under a hire-purchase agreement dated May 6, 1938, the hirer became in arrear with the payments under the agreement after she had paid more than one-third of the total price, so that by virtue of s. 11 of the Hire Purchase Act, 1938, the goods were only recoverable by action. After the right to recover possession of the goods had accrued, the owners, by their solicitors, wrote to the hirer a letter dated January 5, 1940, in which, after pointing out that the payments were in arrear, they said: "You must "therefore please treat this letter as a formal notice determining "the hiring of the goods and that our clients through ourselves "hereby request the surrender thereof. Please take notice that "unless not later than Tuesday next, the 9th instant, you pay the "abovementioned arrears, immediate proceedings will be com-"menced against you to recover possession of the goods."

Held, (1.) that the letter was a proper request in writing to the hirer to surrender the goods within s. 10 of the Act so as to cause the possession of the hirer to "be deemed to be adverse to" the owners; and (2.) that after a proper notice had been given under s. 10, there was no need for the owners to attend at the hirer's premises to ask for the surrender of the goods.

So held by the Court of Appeal (MacKinnon and Luxmoore L.JJ. and Tucker J.) reversing the decision of the county court judge on both points.

APPEAL from His Honour Judge Trevor Hunter sitting at Ilford County Court.

By an agreement dated April 20, 1935, between the plaintiffs, Smart Brothers, Ld., and the defendant, Mrs. Frances Pratt, furniture of the value of 21*l.* 12*s.* 6*d.* was let to her on hire purchase, the first payment of 15*s.* to be in consideration of an option to purchase the goods and thereafter a rental of 11*s.* a month was to be paid. After 14*l.* 6*s.* 6*d.* had been paid under this agreement, further furniture was acquired by the defendant, Mrs. Pratt, from the plaintiffs on hire purchase of the value of 29*l.* 11*s.* By a consolidating agreement dated May 6, 1938, the two transactions were consolidated, the previous payments of 14*l*. 6*s*. 6*d*. being treated as paid for the option to purchase the furniture and a rental of 1*l*. a month being also payable. Clause 8 of this agreement provided: "In case of any breach of any term hereof the owners may: "(*a*) forthwith without notice terminate the hiring and repossess "themselves of and recover the goods; (*b*) alternatively, by "written notice, forthwith absolutely determine and end this "agreement and the hiring hereby constituted and thenceforth "the hirer shall be no longer in possession with the owners' "consent."

The defendant, Mrs. Pratt, soon got into arrear with her payments and on December 15, 1939, the plaintiffs' representative called upon her and demanded the goods, but she said she meant to pay for them. On January 5, 1940, her monthly payments were in arrear to the extent of 10*l*. 7*s*. and on that date the plaintiffs' solicitors wrote to her and after saying mistakenly that her payments were 16*l*. 7*s*. 6*d*. in arrear, continued: " You must therefore please treat this letter as a "formal notice determining the hiring of the said goods and "that our clients, through ourselves, hereby request the "surrender thereof. Please take notice that unless not later "than Tuesday next, the 9th instant, you pay the above-"mentioned arrears, immediate proceedings will be commenced "against you to recover possession of the goods . . . ." The letter also gave the defendant the option if she preferred to surrender the goods without proceedings being brought against her to furnish the solicitors within three days with a day and time when the plaintiffs might call to collect the goods.

On February 9, 1940, this action was commenced to recover the goods. The county court judge held that the letter of the solicitors did not comply with s. 10 of the Hire Purchase Act, 1938. He thought that the language of s. 10 contemplated two distinct and separate events, a notice determining the hiring and a demand for possession and that it was not complied with by the insertion in the same letter of one sentence intended to have the one effect, followed by another sentence intended to have the subsequent effect. There were no words in s. 10 authorizing such a qualified request to surrender the goods as this and the letter did not contain a request complying with s. 10.

If he were wrong as to this and a request for surrender of goods within s. 10 had been made, the plaintiffs must still attend at the defendant's premises to obtain the surrender of the goods before commencing proceedings to recover the goods, unless they had received a notice that this would be ineffective. Sect. 10 only relieved the owners of the burden of the very strict proof of demand and refusal previously required; but the owners must still attend at the hirer's premises to obtain a surrender of the goods unless they were told that this would be ineffective.

The plaintiffs appealed. The appeal was heard on June 27, 1940.

G. J. Lynskey K.C. and *A. A. Pereira* for the appellants. As more than one-third of the total amount payable for the goods under the hire-purchase agreement had been paid, the owners were prevented by s. 11 of the Hire Purchase Act, 1938, from recovering possession of the goods otherwise than by action. Therefore the owners had no right to demand the return of the goods and could only get them by action after a notice given under s. 10 or by consent. The county court judge has taken the view that there must not only be a proper notice given under s. 10 but that the owners should attend at the premises of the hirer to ask for the goods. He also said that the notice in the letter of January 5, 1940, was not a proper notice, as it was a qualified demand.

As s. 11 prevents the owner from exercising his right to take possession except by action, there is no justification for requiring the owners to attend at the hirer's premises to collect the goods after giving a notice under s. 10 either under the Act or at common law. The object of s. 10 was to relieve the owners of giving strict proof of a demand for the goods and refusal of them; and after doing that he can commence his proceedings without more.

On the question whether the letter of January 5, 1940, was a good demand under s. 10. It is a request for delivery

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unless before a certain date all arrears were paid. On the hirer's failure to pay them it became an absolute demand and complies strictly with s. 10. Further, there could be no objection to giving the hirer an opportunity to surrender the goods by consent. The county court judge also made a point about the letter containing both a notice determining the agreement and a demand for surrender of the goods. But in fact the visit of the owner's agents to the hirer on December 15, 1939, demanding the goods had shown that the right to recover possession had accrued.

The defendants did not appear on the appeal.

MacKinnon L.J. This is an appeal from the decision of His Honour Judge Trevor Hunter at Ilford County Court on a claim by the plaintiffs, Smart Brothers, Ld., against Mrs. Pratt, which arose under a hire purchase agreement.

Under the hire purchase agreement, Mrs. Pratt came into possession of a quantity of furniture the property of the plaintiffs, under an obligation pursuant to the agreement to pay so much a month. She fell into arrear; and the plaintiffs in consequence desired to claim repossession of the goods that they had let her have. Their right to do so is now subject to the provisions of the Hire Purchase Act, 1938. They issued their plaint in the county court, claiming an order for delivery up to them of certain goods specified in the schedule. The whole question before the learned judge was whether they were entitled to an order for possession.

Their rights in that respect are subject to the provisions of the Hire Purchase Act, 1938, of which the two material sections are ss. 10 and 11. Sect. 10 provides: "Where, in "an action by an owner of goods which have been let under "a hire purchase agreement, to enforce a right to recover "possession of the goods from the hirer, the owner proves "that, before the commencement of the action and after the "right to recover possession of the goods accrued, the owner "made a request in writing to the hirer to surrender the goods, "the hirer's possession of the goods shall, for the purposes of "the owner's claim to recover possession thereof, be deemed "to be adverse to the owner." Sect. 11 provides that where more than one third of the hire-purchase price has been paid, "the owner shall not enforce any right to recover possession "of the goods from the hirer otherwise than by action."

This was a claim to recover possession by action under s. 11, and it was necessary for the owners to prove, in order to establish the adverse possession of the hirer, that they had, before issuing the plaint, made a request in writing to the hirer to surrender the goods. They sought to do that by a letter written by their solicitors on January 5, 1940, the receipt of which was acknowledged by the defendant. [His Lordship stated the material part of that letter.] The learned judge has held that that letter did not constitute, within the meaning of s. 10, a request in writing to the hirer to surrender the goods. I am afraid I cannot agree with that view. It is true that it is a conditional request, and it gives a locus pœnitentiæ to the hirer. It intimates that the request for return will not be persisted in if she pays the arrears; but unless the arrears are paid by a named date, as I think, it categorically requests the surrender of the goods. The fact that there is that conditional privilege of the hirer to avoid the necessity of surrender, if she does something, does not seem to me to impair the effectiveness of the letter, as being a request in writing to surrender the goods.

I should have said that the section requires that this request should be made after the right to recover possession of the goods has accrued. With regard to that the judge has found (and there is no reason to differ from him) that the condition has arisen because the owners' man had gone round on December 15 and asked if she wished to surrender the goods; and by reason of that a right to recover possession of the goods had accrued before the sending of this notice.

The other matter which the learned judge found to be an obstacle in the way of the plaintiffs was that in his view it is necessary under s. 10 that, in addition to the request in writing that the section requires for the surrender of the goods, the owner shall make a subsequent visit to the hirer's premises, with a van or other vehicle to take them away. I do not very clearly follow the reasoning or view of law which is said to have necessitated that condition. It seems to me to be clearly outside the language of s. 10. Nothing of the sort is required by that section. I do not see in law any reason why you should add that condition to the provisions of the section, which says quite simply that after a request has been made for surrender, " the hirer's possession of the goods shall, for "the purpose of the owner's claim to recover possession thereof, "be deemed to be adverse to the owner." So that under s. 11 he is entitled to ask the court to make the order for delivery of possession to him.

On both these grounds, I think that the learned judge was wrong in saying that the plaintiffs had not prima facie established their right to relief in this action. He ought to have dealt with the claim and considered it on its merits, pursuant to the discretion vested in him under s. 12 of the Act. The result is that the appeal must be allowed.

In his judgment he said if he were wrong on this point, that under his powers under s. 12 he would make an order for delivery of the goods to be suspended so long as the defendant paid 1*l*. a month. As he has by anticipation given that indication, I think that we can direct that, for his judgment, an order in those terms shall be substituted.

LUXMOORE L.J. I agree. There are two quite short points that arise on this appeal. The first is, what is the true construction of s. 10 of the Hire Purchase Act, 1938? The learned county court judge has held that a request in writing for the surrender of the goods, the subject-matter of the hire-purchase agreement, is not by itself sufficient unless it is followed by a formal demand for the surrender of the goods. On looking at the section, it is impossible to find why he has added this extra requirement. [His lordship read the section:] All the section says is that there must be a request in writing. What follows from the request is, that, if the making of it is proved at the hearing of the action to recover possession, then it is not necessary to prove any other fact to establish that the possession of the hirer is adverse to that of the owner.

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Luxmoore L.J.

The requirements of s. 10 are evidential; this becomes plain if the application of s. 11 to a case like the present is considered. In such a case it would be impossible to take possession of the goods inasmuch as more than one-third of the purchase price has been paid; and consequently the only method of enforcing the right to recover possession open to an owner is by action. If the owner went to the hirer and asked for surrender of the goods, the answer that the hirer would make is: "You cannot take the goods, because s. 11 "says you can only recover them by process in Court." If on that reply the owner started an action and s. 10 was not there, he would be met at the trial by the fact that there was no proof of adverse possession, inasmuch as the refusal to hand over the property was due to the provisions of s. 11. The object of s. 10 is to enable the owner to satisfy the requirements as to proof of adverse possession in his action for recovery of his goods. I can see no ground for reading into the section any necessity for following up the request in writing with a formal demand for possession.

The only other question is whether the notice which was given on January 5 was a sufficient notice to meet the requirements of s. 10. The material part of the letter is a statement that this letter must be treated "as a formal "notice determining the hiring of the goods, and that our clients "through ourselves, hereby request the surrender thereof." So far as a formal notice determining the hiring is concerned, that was not necessary, because the county court judge has held that there was a formal notice determining the hiring on the previous December 15. The learned county court judge did suggest that the letter might be insufficient, because it gave formal notice determining the hiring at the same time as it asked for the surrender of the goods. I do not propose to deal with that point because it does not arise in the circumstances of the case. There is no doubt that there is a request for surrender in that letter.

The next paragraph in the letter is: "Please take notice "that unless not later than Tuesday next, the 9th instant, "you pay the above mentioned arrears, immediate proceedings

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"will be commenced against you to recover possession of the "goods." The learned county court judge has held that that paragraph has made the notice ambiguous. He says the letter gives an option to the recipient as to what she will do in the matter. I do not so read the letter. I read it as a formal demand for the surrender of the property, followed by an option to the hirer of the goods, that if she complies with the terms of that notice, the surrender demanded would not then be enforced. None the less, the letter is an unequivocal demand for surrender. The lady did not comply with the condition set out in the following paragraph; and the formal demand for surrender remained unequivocal.

Therefore I agree that the county court judge's judgment must be set aside; and that there must be substituted for it the order which he said he would make if this Court came to a different conclusion on the question of law from that at which he arrived. The Court has come to a different conclusion; and therefore the order which he suggests is the proper order to be substituted for that which he originally made.

TUCKER J. I agree. The only question in this case is whether the letter of January 5, 1940, is a sufficient request in writing to the hirer to surrender the goods within the meaning of s. 10 of the Hire Purchase Act, 1938. On reading the judgment of the learned county court judge, I think that the matter which really troubled him was whether the request in writing to surrender under this section might be said to be satisfied if the hirer was called upon to send the goods several hundred miles by rail to the premises of the owners. I do not think that difficulty arises in this case. We are dealing with the particular request in the letter of January 5, 1940; and I agree with what has been said by my Lord and Luxmoore L.J. with regard to that.

I would only add that when one reads this letter as a whole, it is quite clear, in my view, that the owners are not requesting the hirer to send the goods to their premises a long distance away. The essential part of this notice contains these words: "If you prefer to deliver up the goods without proceedings

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"being commenced for their recovery . . . . you may within "three days of the date of this letter, furnish us with a day "and time when our client may call with your consent to "collect the goods." It is perfectly clear that what is being requested is a surrender to the agent of the plaintiffs at the premises of the defendant at a time and date convenient to the defendant. So I do not think the difficulty which I think was in the mind of the learned judge arises in this case at all. I agree that the appeal should be allowed and the order suggested made.

Appeal allowed.

Solicitors for the appellants: *Tudor & Rowe.*

H. C. G.

HOUGH *v.* LONDON EXPRESS NEWSPAPER, LIMITED.

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May 1, 9.

[1938. H. No. 688.]

Defamation — Libel — Newspaper article—Article not defamatory in primary sense, but defamatory in secondary sense by reason of special facts—Special facts known to certain readers of article, but no evidence that anyone misled thereby—Liability of publisher of newspaper.

In an action for libel in respect of words which are not defamatory in their primary meaning, but are capable of being understood in a secondary and defamatory sense by persons having knowledge of certain special facts, in order to support an innuendo that the words bear the secondary and defamatory meaning, it is sufficient for the plaintiff to allege and to prove that there are persons who know the special facts and so might understand the words in that secondary and defamatory sense, without proving that any person did in fact understand them in that sense.

Cassidy v. *Daily Mirror Newspapers, Ld.* [1929] 2 K. B. 331, considered.

APPEAL from the judgment of Croom-Johnson J.

Mrs. Florence Sarah Hough (hereinafter called "the plaintiff"), who resided in Battersea, London, was the wife of Frank Hough, a professional boxer.

The London Express Newspaper, Ld. (hereinafter called "the defendants"), were the proprietors of a newspaper called the Daily Express.

In the issue of that newspaper published on December 22, 1937, there appeared the following article: "Frank Hough's "curly headed wife sees every fight. 'I should be more in "'suspense at home,' she says. 'I always get nervous when "'he gets in the ring, although I know he won't get hurt. "'Nothing puts him off his food. He always eats a cooked "'meal at night, however late it is when he gets in.'"

On February 25, 1938, the plaintiff brought the present action against the defendants claiming damages for libel.

In her statement of claim the plaintiff alleged (para. 1), that she was and at all material times had been known as the lawful wife of Frank Hough; (para. 2) that the defendants

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in their said issue of their said newspaper had falsely and maliciously printed and published the words of the said article; (para. 3) that the said words were falsely and maliciously printed and published by the defendants of and concerning the plaintiff in that the said curly-headed woman who saw every fight of Frank Hough's was some woman not the plaintiff, and not lawfully married to the said Frank Hough, and that the said words meant and were understood to mean that the plaintiff was a dishonest woman falsely representing herself to be and passing as the wife of the said Frank Hough, and that the said Frank Hough was not her husband and that she was an unmarried woman who had cohabited with and had children by the said Frank Hough without being married to him; and (para. 4) that by reason of the premises the plaintiff had been injured in her credit and reputation, and had been brought into hatred, ridicule and contempt.

The defendants in their defence said (inter alia) (para. 2) that they admitted that they published the words complained of in para. 2 of the statement of claim, but denied that they published the same of or concerning the plaintiff; and that they admitted further that the woman therein referred to was not in fact the plaintiff; (para. 3) that the defendants denied that the words bore or were understood to bear or were capable of bearing the meanings alleged in para. 3 of the statement of claim; and that the said words without the said alleged meanings were not defamatory; and (para. 4) that the defendants denied every allegation contained in para. 4 of the statement of claim.

At the trial of the action it was proved that the plaintiff was the wife of Frank Hough, and that, as to the woman referred to in the said article, the description there given of that woman did not apply to the plaintiff.

Evidence was given on behalf of the plaintiff by Mrs. Jessie Pitman that at the time when the said article appeared she was living next door to the plaintiff, that she had known the plaintiff since the latter's infancy, that she knew quite well that the plaintiff was the wife of Frank Hough, that when she saw the article she immediately showed it to the plaintiff and told her she would have to do something about it, and that one or two of the streets were all talking about the article; and by Mrs. Florence Meredith, who said that she lived in Battersea, that she knew the plaintiff and knew that she was the wife of Frank Hough, that she saw the said article in the said newspaper, and on seeing it she went to the house of the plaintiff's sister and asked her if she had seen it, that the plaintiff's sister then bought a copy of the said newspaper, that as to the effect of the article in the neighbourhood they were all talking about it, one and the other, all looking at the papers and buying them, and that there was a run on the Daily Express.

There was no evidence to show that anyone who had read the said article understood it in the sense attributed to it in the innuendo in para. 3 of the statement of claim, or that anyone who had known the plaintiff as the wife of Frank Hough, had been led by the said article to believe or suppose that she was not his wife.

Croom-Johnson J. came to the conclusion that persons having knowledge of such special facts concerning the plaintiff as the witnesses on her behalf stated that they had, might reasonably be led by the article to put upon it the construction set forth in the innuendo, and he gave judgment for the plaintiff for 52*l.* 10*s.* damages.

The defendants appealed. The appeal was heard on May 1, 1940.

G. O. Slade for the defendants, appellants. The learned judge was wrong in holding that the article complained of constitutes a libel on the plaintiff. It does not do so. The article construed according to its primary meaning, as it would be construed by all persons having no knowledge of special facts concerning the plaintiff, has no defamatory meaning. So construed it does not convey either expressly or by implication that the plaintiff is not the wife of Frank Hough. In order that the article should have a defamatory meaning it would be necessary that it should be construed

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according to the secondary meaning in which it would be understood by persons who had known the plaintiff as the wife of Frank Hough, who knew that the woman described in the article was not the plaintiff, and who were led by the article to believe that the plaintiff was not his wife but had been posing as such. Where the statement complained of is only defamatory in a secondary sense the plaintiff must not only assign that defamatory meaning by an innuendo, but he must also plead and prove the circumstances by virtue of which the statement has that secondary and defamatory meaning: see Spencer Bower on Actionable Defamation, 2nd ed., p. 39, art. 16 and note *n*; and also *Nevill* v. *Fine Art, &c., Insurance Co.* (1); and *Tolley* v. *J. S. Fry & Sons, Ld.* (2) Here the plaintiff does not allege in her statement of claim that any person who had known her as the wife of Frank Hough had been led by the article to think that she was not his wife. Nor did she produce at the trial any evidence to show that anyone who had known her as the wife of Frank Hough had been induced by the article to alter that opinion. No reasonable person having knowledge of the special facts which might induce a person to understand the article in this secondary and alleged defamatory sense would draw the inference from it that the plaintiff was not the wife of Frank Hough. In order that the defendants may be liable for the article it must be shown that the special facts, the knowledge of which might give it a secondary and libellous meaning were known not only to some reader of the article, but also to the defendants at the date of publication. Here the special facts were not known to the defendants when they published the article. In an action for libel in respect of a statement which is defamatory in its primary sense it has no doubt been held that it is no defence to show that the defendants did not intend to defame the plaintiff: *Hulton & Co.* v. *Jones* (3); but it does not follow that a similar decision should be come to in the case of a statement which is only defamatory when understood in a secondary sense by persons having knowledge

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(1) [1897] A. C. 68.
(2) [1930] 1 K. B. 467; [1931] A. C. 333.
(3) [1910] A. C. 20.

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of special facts. This case is distinguishable from *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1), for in that case three witnesses were called on behalf of the successful plaintiff, who stated that they had known the plaintiff as the wife of M. C., but had been led by the matter published in a newspaper of the defendants to think that she had been pretending to be his wife while not in fact such; whereas here no such evidence has been given.

D. F. Brundrit for the plaintiff, respondent, was not called upon to argue.

Cur. adv. vult.

1940. May 9. SLESSER L.J. In this case it is not suggested that the words complained of are defamatory in their primary and natural meaning. They were as follows: " Frank Hough's "curly headed wife sees every fight. 'I should be in more "'suspense at home,' she says. 'I always get nervous when "'he gets in the ring, although I know he won't get hurt. "'Nothing puts him off his food. He always eats a cooked "'meal at night, however late it is when he gets in.'"

The action is based entirely upon the innuendo pleaded in para. 3 of the statement of claim to this effect: "The said "words were falsely and maliciously printed and published "by the defendants of and concerning the plaintiff in that "the said curly headed woman who sees every fight of Frank "Hough's is some woman not the plaintiff and not lawfully "married to the said Frank Hough and the said words meant "and were understood to mean that the plaintiff was a "dishonest woman falsely representing herself to be and "passing as the wife of the said Frank Hough and that the "said Frank Hough was not her husband and she was an "unmarried woman who had cohabited with and had had "children by the said Frank Hough without being married "to him."

In these circumstances, it was necessary at the trial to prove by evidence that the matter published in the particular case conveyed to the mind of a normal person cognizant of the special circumstances what to the mind of a normal person unacquainted therewith it would not convey. In the present case the special circumstances which had to be proved were that the plaintiff was the wife of Frank Hough and was known to her acquaintances to have held herself out to be his wife. On this head, there is ample evidence that many neighbours of Mrs. Hough knew her to be the wife of Frank Hough, and that when the article appeared, according to the evidence of Mrs. Pitman and Mrs. Meredith, who lived next door to Mrs. Hough, wherever they went they were talking about it, or to quote Mrs. Pitman " one or two of the streets "were all talking," and as Mrs. Meredith said : " they were "all talking about it, one and the other, all looking at the "papers and buying them. There was a run on the Daily "Express."

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(1) [1929] 2 K. B. 331.

In these circumstances, the learned judge, sitting without a jury, has come to the conclusion that the article would convey to people acquainted with such facts, the imputation that the lady, instead of being a respectable married woman, as she represented herself to be, was not a respectable person at all, and this finding seems to me entirely consistent with the evidence. In *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1), Scrutton L.J. said : " In my view the words published were "capable of the meaning ' Corrigan is a single man,' and were "published to people who knew the plaintiff professed to be "married to Corrigan ; it was for a jury to say whether those "people could reasonably draw the inference that the so-called "Mrs. Corrigan was in fact living in immoral cohabitation "with Corrigan, and I do not think their finding should be "interfered with." In that case, the defendants had published in their newspaper a photograph of Mr. Corrigan and a Miss X, with the words " Mr. M. Corrigan the race-horse "owner and Miss X, whose engagement has been announced." The plaintiff in that case was known to her acquaintances as the lawful wife of Mr. Corrigan, and it was held by the majority of the Court that such a publication was capable of conveying a meaning defamatory of the plaintiff, the jury having found that it conveyed to reasonably minded people possessed of such information an aspersion on her moral character. The only difference, on the facts, between that case and the present is that here the lady who was said to have been associated with Hough was stated to be his wife and not his fiancee, and the inference drawn in *Cassidy's* case by the jury was here drawn by the judge who had to perform their duties. *Cassidy's* case in this respect did not lay down any new law. The only qualification to the existing law there made was that in order to give a defamatory meaning to a statement ex facie innocent by reason of extrinsic facts it is not necessary that those facts must be known to the person publishing the statement, as had been held by Brett L.J. in *Capital and Counties Bank* v. *Henty*. (1) This earlier view was dissented from because, in the language of Russell L.J. in *Cassidy's* case (2), it " cannot in my opinion survive the decision of "the House of Lords in *E. Hulton & Co.* v. *Jones*." (3)

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(1) [1929] 2 K. B. 331, 340.

The only question remaining in the present case is this: There were called by the plaintiff, perhaps unnecessarily, two witnesses who, among other matters, spoke to the meaning which the passage complained of represented to their minds. Mrs. Pitman said she knew it was not Mrs. Hough who was referred to in the article and that in fact she knew she was married to Frank Hough. And Mrs. Meredith, who had known Mrs. Hough for twenty years, said that she knew that the curly-headed woman who had attended the fights was not Mrs. Hough. On this, it is argued by the appellants that the only evidence adduced in the case was to the effect that persons reading the article would not regard it as reflecting upon Mrs. Hough as a married woman since they knew that the person referred to in the article was not Hough's wife, but this argument rests upon a misconception.

The burden on the plaintiff is to give evidence of special circumstances which would lead reasonable persons to infer that the words were understood in a defamatory meaning provided such circumstances were known to those persons to

(1) (1880) 5 C. P. D. 514; affd. 7 App. Cas. 741.

(2) [1929] 2 K. B. 331, 353.

(3) [1910] A. C. 20.

whom the words were published: *Capital and Counties Bank* v. *Henty.* (1) The evidence required is evidence of special facts causing the words to have a meaning revealed to those who knew the special facts but not revealed by the words in the absence of such knowledge: *Tolley* v. *J. S. Fry & Sons, Ld.* (2): but as Greer L.J. points out in the same case in the Court of Appeal (3): "It is not proof of a special fact in this sense "merely to call a number of people to say that they understood "the words in a defamatory sense; they would have to prove "some fact known to them which would be sufficient to entitle "any reasonable man with such knowledge to interpret the "words in a defamatory sense." And, conversely here the mere fact that two ladies knew that Mrs. Hough was Hough's wife and so did not regard the article as defamatory upon her, though possibly defamatory upon the curly-headed lady or Mr. Hough himself, does not acquit the defendants of liability.

People with the knowledge that Mrs. Hough represented herself to be the wife of Hough and that in this country a man may only marry one woman at a time, might very probably come to the conclusion that the article contained an aspersion upon her moral character. It is true that the special circumstances being proved and the foundation laid the question "what did you understand by the words?" may be asked a witness: *Daines and Braddock* v. *Hartley* (4), considered in *Simmons* v. *Mitchell* (5), and in this case such questions unnecessarily addressed to Mrs. Pitman and Mrs. Meredith have presented the appellants with an argument, albeit an unsound one; but the evidence of Mrs. Pitman and Mrs. Meredith on this head amounts to no more than this: that those two particular persons did not regard the article as an aspersion. It by no means follows that others with knowledge of the facts would not think otherwise of the plaintiff. The learned judge properly drew the inference that such reasonable persons knowing the circumstances generally would regard the article as defamatory. Consequently this appeal fails.

(1) (1882) 7 App. Cas. 741.
(2) [1931] A. C. 333.
(3) [1930] 1 K. B. 467, 480.
(4) (1848) 3 Ex. 200.
(5) (1880) 6 App. Cas. 156, 163.

CLAUSON L.J. asks me to say that he agrees with this judgment and has nothing to add.

GODDARD L.J. The question of law that arises in this case may thus be stated. Where words are not defamatory in their ordinary meaning, but by reason of special facts are capable of being understood in a secondary and defamatory sense by persons to whom the special facts are known, is it necessary to prove more than that there are people who know the special facts and so might understand the words in a defamatory sense or must there be evidence that some person did so understand them? In my opinion it is unnecessary, though I do not say inadmissible, to call persons to say that they did so understand the words, provided it is proved that they are people who might so understand them. Such witnesses were called in *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1) In the case of words defamatory in their ordinary sense the plaintiff has to prove no more than that they were published: he cannot call witnesses to prove what they understood by the words; nor will it avail the defendant to call any number of witnesses to say that they did not believe the imputation. The only question is, might reasonable people understand them in a defamatory sense? So when circumstances are proved which will clothe words otherwise innocent with a defamatory meaning the question must equally be: might reasonable people who know the special circumstances understand them in a defamatory sense? If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue. So if it be said of A. that he is a forger, no witnesses are necessary or can indeed be called to say that they believed the charge: if, then, he being a married man, it is said of him "yesterday he married Miss X" it defames him to those people who know that he already has a wife even if they did not believe he had actually committed bigamy. In the present case there was evidence that the plaintiff was the wife of Frank Hough, and was living apart

(1) [1929] 2 K. B. 331.

from him, and that this fact was known to persons in the neighbourhood. In view of the decision in *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1), the words published are capable of being understood by those neighbours in a sense defamatory of the plaintiff. The learned judge was therefore justified in holding that had there been a jury there was a case to be left to them, and it was immaterial that the two witnesses who were called did not themselves believe the imputation that they conveyed. It follows then that sitting as a jury the judge could find that the words were in fact defamatory of the plaintiff.

Had it not been for the decision in *Cassidy* v. *Daily Mirror Newspapers, Ld.* (1), I should not have held that a statement that a man who in fact has a wife is about to get married, or that he has a wife who is clearly indicated as being some one other than his lawful wife, were capable of conveying to reasonable people that the latter had been living with him as his mistress. Such a statement would no doubt be defamatory of and actionable by the man, provided of course, that he had not procured the publication as Cassidy did, and might well be of the other woman also, but I feel precisely the same difficulties as did Greer L.J., in holding that reasonable people would in these circumstances impute immorality to the lawful wife. But in view of that decision I think both the learned judge and this Court are bound to hold that the words in this case are capable of bearing the meaning put upon them.

Appeal dismissed.

Solicitors for appellants: *Shirley Woolmer & Co.*
Solicitors for respondent: *H. C. L. Hanne & Co.*

J. R.

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(1) [1929] 2 K. B. 331.

HINDLEY AND COMPANY, LIMITED *v.* GENERAL FIBRE COMPANY, LIMITED.

1940
June 28.

Contract—Sale of jute—Four alternative ports of discharge at buyers' option—Two of ports enemy ports—Declaration of enemy port by buyers—Right of buyers to withdraw nomination and declare another port—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 1.

By a contract dated July 27, 1939, 250 bales of jute were sold to be shipped from Calcutta for Hamburg, Antwerp, Rotterdam, Bremen, between September 1 and October 31, 1939. The buyers had to declare the port of destination. War between Great Britain and Germany broke out on September 3, 1939, and thereafter trading with the enemy became illegal under the Trading with the Enemy Act, 1939. On September 11 the buyers declared Bremen as the port of destination. The sellers thereupon claimed that the contract must be regarded as cancelled. The buyers on September 27 withdrew their declaration of Bremen and on October 3 declared Antwerp as the port of destination:—

Held, that the declaration of Bremen was a nullity, and that as the contract could be performed in a legal manner, the buyers were entitled to withdraw the bad declaration of Bremen and to declare Antwerp as the port of destination, so that as the sellers had not delivered the jute there the buyers were entitled to damages for the sellers' breach of contract.

AWARD stated in the form of a special case by the Appeal Committee of the Jute Association.

By contract dated July 27, 1939, the General Fibre Co., Ld. (hereinafter called "the sellers") sold to Hindley & Co., Ld. (hereinafter called "the buyers") at 19*l.* 7*s.* 6*d.* per ton c.i.f. 250 bales of jute of crop 1939-40, to be shipped from Calcutta and/or Chittagong for H. A. R. B. (which means Hamburg, Antwerp, Rotterdam, Bremen) between September 1, 1939, and October 31, 1939, both inclusive, port to be declared on or before August 15, 1939.

The contract provided for disputes between buyers and sellers being referred for decision to two arbitrators with the right of appeal (which involves a rehearing) to the Jute Association for decision by the Appeal Committee.

A dispute under the contract was referred to the arbitrators, buyers claiming that sellers must implement the contract.

The arbitrators made their award on March 7, 1940, awarding that sellers must implement the contract.

The sellers appealed from the award of the arbitrators to the Jute Association.

The Appeal Committee of the Jute Association heard the appeal and on May 16, 1940, at the request of the parties made their award in the form of a special case.

The facts, in addition to those set out above, were as follows :—

1. The typewritten clause "Port to be declared" in the jute trade meant that it is for buyers to declare to sellers the port of destination.

2. By letter dated September 11, 1939, buyers declared Bremen as the port of destination under the contract.

3. Sellers replied to buyers' letter of September 11, 1939, on September 22, 1939, that the contract for which Bremen had been declared as port of destination must be regarded as cancelled.

4. Buyers wrote to sellers on September 23, 1939, stating that, pending legal advice, buyers could only accept sellers' cancellation under reserve.

5. On September 27, 1939, buyers wrote to sellers that, as declaration of enemy port after outbreak of war would not be legal, they declared Antwerp or Rotterdam under the contract as the final port of discharge.

Such an alternative declaration is in the jute trade a good declaration, sellers being able to obtain an optional bill of lading and insurance policy providing for the ship to deliver at one of two such named destinations.

6. By letter dated September 27, 1939, sellers adhered to their letter of September 22.

7. Buyers by letter dated October 3, 1939, declared Antwerp as the port of destination on the grounds that (*a*) sellers in respect of a contract dated July 20, 1939, for purchase by sellers from buyers of 250 bales of the same grade of jute had declared Antwerp as the port of destination, and (*b*) buyers had allocated the 250 bales last mentioned against sellers' purchase under the contract.

8. By a postcard dated October 25, 1939, which was headed "250 bales Tossa September/October Antwerp at 19*l*. 7*s*. 6*d*. "c/d 27.7.39" sellers claimed protection under clause 8 of the contract.

9. Neither the 250 bales under the contract nor any part thereof were or was ever shipped.

10. 250 bales, the subject-matter of the contract, were equivalent to 44 tons, 12 cwts, 3 quarters and 12 lbs., the contract price therefor at 19*l*. 7*s*. 6*d*. per ton being 864*l*. 19*s*. 2*d*.

11. Assuming (having regard to the question of law arising) that either the contract was not cancelled or that a new contract was made on the same terms as the said contract, the date of default was December 15, 1939, and the market value was therefore that on December 16, 1939.

12. The market value of 250 bales called for by the said contract on December 16, 1939, at 44*l*. 7*s*. 6*d*. per ton, was 1981*l*. 0*s*. 7*d*.

Subject to the opinion of the Court upon the questions of law hereafter to be referred to, the appeal committee found and awarded that (*a*) the said contract was not cancelled ; (*b*) sellers, whether under the said contract or under a new contract on the same terms as the said contract, were in default ; (*c*) sellers do pay to buyers 10*s*. per ton plus the difference between the said market value (44*l*. 7*s*. 6*d*. per ton) and the said contract price (19*l*. 7*s*. 6*d*. per ton), namely, 1138*l*. 7*s*. 10*d*. in all.

The Appeal Committee also made an award as to costs, and an alternative award if the Court should be of opinion that the said contract was cancelled and that no new contract on the terms of the said contract was made.

The questions of law arising together with the answers of the Appeal Committee were as follows :

1. Whether upon receipt of the buyers' letter of September 11, 1939, declaring Bremen as the port of destination under the contract of July 27, 1939, for the sale by the sellers to the buyers of 250 bales jute shipment as therein set out to Hamburg, Antwerp, Rotterdam, Bremen, the sellers were entitled to treat the said contract as cancelled ?—A. No.

2. Whether thereafter upon receipt of the sellers' letter

of September 22, 1939, stating that the contract must be regarded as cancelled the buyers were entitled: (*a*) by letter of September 23, 1939, to decline to accept cancellation?—A. Yes; (*b*) by letter of September 27, 1939, to declare Antwerp or Rotterdam as the port of destination under the said contract?—A. Yes; and (*c*) by letter of October 3, 1939, finally to declare Antwerp?—A. Yes.

3. Assuming that the sellers were entitled on September 22, 1939, to treat the said contract as cancelled: whether the subsequent letters between the buyers and the sellers: (*a*) contain or evidence a valid waiver by the sellers of their cancellation and affirmation of the original contract to be performed by Antwerp delivery, or (*b*) contain or evidence a new contract by the sellers with the buyers for the delivery at Antwerp of jute as and upon the terms specified in the original contract?—A. Yes.

T. K. Wigan for the sellers. Up to September 11, 1939, there was a contract complete in all its terms except one which the buyers were entitled to supply. That contract became complete on September 11, 1939, when the buyers declared Bremen as the port of destination. That contract was one which, under the Trading with the Enemy Act, 1939, it would be illegal to perform and was therefore unenforceable. If a contract provides for the doing of an act which is forbidden by law the contract is illegal and void, and no action will lie for breach of such a contract. If, however, a contract can be performed in a legal way as well as an illegal way, the presumption is that the intention of the contracting parties was that it should be performed in a legal manner: see *Waugh* v. *Morris* (1), where Blackburn J. (delivering the judgment of the Court) said: "We quite agree, that, where "a contract is to do a thing which cannot be performed "without a violation of the law it is void, whether the "parties knew the law or not. But we think, that in order "to avoid a contract which can be legally performed, on the "ground that there was an intention to perform it in an illegal "manner, it is necessary to shew that there was the wicked

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(1) (1873) L. R. 8 Q. B. 202, 208.

"intention to break the law; and, if this be so, the knowledge "of what the law is becomes of great importance." That dictum was cited with approval by Lord Roche in *Nash* v. *Stevenson Transport, Ld.* (1), a case where the contract was held to be void. In the present case the contract was incomplete until the option as to the port of delivery was exercised by the buyers, and as soon as the option was exercised by the buyers naming Bremen as the port of discharge the contract became illegal. Until that option had been exercised by the buyers in the way it was the contract could have been carried out either in a legal or an illegal manner. The exercise by the buyers of their option by naming Bremen as the port of discharge was a final exercise by them of their option and they could not afterwards change the port of discharge by naming another port. The exercise of an option is final if it has been acted upon, and it must be equally final even though it has not been acted upon. In *The Teutonia* (2) the ship had under the charterparty to proceed to any safe port, whereas in the present case the ship had to be discharged at one of four named ports, the port that was named by the buyers was an enemy port and therefore the contract became illegal under the Trading with the Enemy Act, 1939. The buyers had the right to declare Bremen as the port of discharge, but having declared that port the Act made the contract an illegal one to carry out. In *Waugh* v. *Morris* (3) it was held that inasmuch as the contract could be carried out in a legal manner it was therefore not void. Whereas in the present case as soon as Bremen was named as the port of discharge the contract could not be performed in a legal manner and therefore it was void.

Secondly, there can be no waiver or affirmation of a void contract. The buyer's letter of October 3, 1939, was a claim that the old contract was still on foot, under which they named Antwerp as the port of discharge. The postcard of October 25, 1939, cannot be construed as an acceptance of a new offer. There was never an intention to create a new contract: see *Harvey* v. *Facey*. (4) An acceptance will not be

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(1) [1936] 2 K. B. 128, 133.
(2) (1872) L. R. 4 P. C. 171.
(3) L. R. 8 Q. B. 202.
(4) [1893] A. C. 552.

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implied from doubtful words. Claiming the benefit of clause 8 was not an acceptance of the buyers' offer, but merely a reply to the buyers' claim that the sellers were bound to deliver. It was said in *Hussey* v. *Horne-Payne* (1) that the Statute of Frauds "is a weapon of defence, not offence." The sellers' statement does not amount to an estoppel. Bowen L.J. pointed out in *Low* v. *Bouverie* (2) that "the language upon "which the estoppel is founded, must be precise and "unambiguous." If a statement can be reasonably understood in more senses than one it cannot amount to an estoppel.

A. J. Hodgson for the buyers. The effect of the war was to render delivery of the jute to either Hamburg or Bremen illegal. This was a contract with four alternatives as to the port of delivery which could only be exercised one at a time. On the declaration of war delivery at two of the alternative ports became illegal and they must be regarded as struck out of the contract. Where a contract is in its nature separable into distinct parts, that is to say, when it consists of distinct promises based on considerations, some of which are illegal, if the promises based on legal considerations can be separated from the others they are enforceable: see Benjamin on Sale, 7th ed., 520. In the present case the illegal portions of the contract, namely, delivery at Hamburg or Bremen are clearly severable from the rest of the contract which is enforceable. Parke B. said in *Stevens* v. *Webb* (3): "The law "is, that, if an agreement is in the alternative, and one branch "of the alternative cannot be performed, the party is bound "to perform the other." Bowen L.J. in *Anderson* v. *Commercial Union Assurance Co.* (4) said: "It is clear law "that if one of two things which had been contracted for "subsequently becomes impossible, it becomes a question of "construction whether, according to the true intention of "the document, the obligor is bound to perform the "alternative or is discharged altogether."

The buyers, by declaring Bremen as the port of discharge, did something which they were not entitled to do under the

(1) (1879) 4 App. Cas. 311, 323.

(2) [1891] 3 Ch. 82, 106.

(3) (1835) 7 C. & P. 60, 62.

(4) (1885) 55 L. J. Q. B. 146, 150.

contract. The buyers were entitled to recall the improper declaration within the contract times and to correct their mistake, and discharge their obligation under the contract by naming a proper port of discharge. Bramwell L.J. in *Borrowman, Phillips & Co.* v. *Free and Hollis* (1) said: "In "this case, upon the defendants' hypothesis, the plaintiffs by "naming the *Charles Platt*, exercised their option in an improper "manner, therefore they had a right to withdraw their tender, "and to exercise it in a proper manner." The postcard which "the sellers wrote on October 25, 1939, operated either as a waiver: see *Hartley* v. *Hymans* (2), or as an estoppel as the buyers after receiving the postcard altered their position to their detriment, or as an acceptance of a new contract.

T. K. Wigan replied.

ATKINSON J. This Special Case from the Appeal Committee of the London Jute Association deals with a dispute which arises out of a contract which was made on July 27, 1939, under which the General Fibre Co., Ld., agreed to sell to Hindley & Co., Ld., 250 bales of jute, 1939–1940 crop, to be shipped from Calcutta for Hamburg, Bremen, Antwerp or Rotterdam, the port to be declared by the buyers on or before August 15, 1939.

The facts which give rise to the dispute are these, and they are set out in the Case. By a letter dated September 11, 1939, the buyers wrote saying: "Please note we declare "Bremen as port of destination for the above parcel." There is one point which I mention for the purpose of getting it out of the way. It will be observed that that declaration was outside the contract time, but no point has been taken by the sellers as to time, although it might have been open to them; at any rate, from first to last it has been made quite clear that no point as to time arises whether on the original declaration or on the later declaration.

[His Lordship then stated the facts set out in the Special Case.] The Case ends by asking certain specific questions of the

(1) (1878) 4 Q. B. D. 500, 503. (2) [1920] 3 K. B. 475, 486.

Court which it is my duty to answer. The first is whether upon receipt of the buyers' letter of September 11, declaring Bremen as the port of destination under the contract, the respondents were entitled to treat the contract as cancelled. The second question, whether the claimants were entitled to decline to accept the cancellation and to declare Antwerp or Rotterdam, and finally to declare Antwerp, settles itself once one has answered question one.

The contention of the sellers is this. Their argument is that up to September 11 the contract was complete in all its terms but one, that one term being the port of destination, and that once that port was declared, the contract became a complete contract, a contract to ship to Bremen. It must be deemed to be then a contract which contained Bremen as the port of destination, the right to declare other ports had gone and the contract for discharge at Bremen was illegal and void and the contract came to an end. It will be remembered that war broke out on September 3, 1939, and that the Trading with the Enemy Act came into operation certainly either on that date or within a day or two, which made any delivery at Bremen a criminal offence. The Act says: "A person shall be deemed to have traded with the "enemy if he has had any commercial, financial or other "intercourse or dealings with, or for the benefit of, an enemy, "and, in particular but without prejudice to the generality "of the foregoing provision, if he has (i.) supplied any goods "to or for the benefit of an enemy, or obtained any goods "from an enemy, or traded in, or carried, any goods consigned "to or from an enemy or destined for or coming from enemy "territory." No one doubts that a contract to deliver at Bremen would have been a contract which came within that Act. The argument of the buyers is that the effect of the war was not to render the contract as a whole illegal because it could still be performed in a legal way, but that it did render it illegal to declare Bremen or Hamburg, that the duty then resting on the buyers was to declare a legal port, that there was no longer any contractual right to declare either Bremen or Hamburg, and such a declaration imposed no duty contractual or otherwise on the sellers and was just a bad declaration, which was in truth a mere nullity, and that the buyers were under a duty to withdraw that bad declaration and to submit a good one.

Those are the two contentions, and in my opinion the buyers' contentions are more in accordance with the principles which are laid down in the three relevant cases which have been cited to me. It was said on behalf of the sellers that there could be no question that if Bremen had been declared before war broke out, that the contract would have been bad and it would have become one illegal of performance. That contention was not contested by Mr. Hodgson. I am not sure that he was not disposed to agree with it. I doubt very much whether that would have been the result.

I will now refer to the three cases which were cited. The first one is *The Teutonia.* (1) It seems to me to afford a great deal of assistance in determining which is the true view. In that case the master of a Prussian vessel had on board a cargo of nitrate of soda under a charterparty and bill of lading bound to Falmouth for orders to proceed to any safe port in Great Britain or on the Continent between Havre and Hamburg, and there deliver the cargo. The ship arrived at Falmouth on July 10, 1870, and the master received orders on July 11 to proceed to the French port of Dunkirk and there deliver the cargo. On the ship's arrival off Dunkirk on the 16th the master was informed by a French pilot that the Franco-German war had broken out. He then put back to the Downs to make inquiries and anchored there on the 17th, and on the 18th he was ordered by the owner not to go to Dunkirk, and on the 19th he put into Dover. War had in fact broken out on July 19, so that it appeared he might have been able to discharge his cargo at Dunkirk before war actually broke out, but it was decided on that issue of fact that on the information he had it was quite reasonable for him to refuse to put into Dunkirk, and the case was treated as one in which it had become unlawful for him to deliver at Dunkirk on that date. Having put into the Downs the cargo was discharged, or, rather,

(1) L. R. 4 P. C. 171.

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the charterer claimed the cargo and the master declined to hand it over until he received the freight. The question which arose for determination was really the same question as the one here: Had the contract come to an end so that he was not entitled to demand his freight or was it still good in the sense that it gave him the right to demand his freight for delivery at Dover ? Mellish L.J. says this (1) : "The argument "for the appellants assumes, that the breaking out of the war "rendered the performance of the charterparty illegal, and that, "therefore, the contract between the parties was dissolved, "and there can be no doubt that the breaking out of the war "did render it illegal for the *Teutonia* to enter any French port, "but the question is, whether, under the terms of this charter-"party, the contract might not still have legally been performed "by the delivery of the cargo at some of the other ports "mentioned in the charterparty as ports at which the cargo "might be delivered. The substance of the contract between "the parties is, that the cargo may be delivered at any one of a "great number of ports ; that the consignee is to have the "selection of the particular port, but that he is bound to "select a safe port—that is, a port at which the master can "deliver the cargo, and earn his freight ; and the question is, "whether that contract is completely performed by the "naming of a port at which it turns out in the event to be "impossible to deliver. In *Ogden* v. *Graham* (2) it was held "by the Court of Queen's Bench, that the charterer, under a "charterparty framed like this, committed a breach of contract "by naming a port which was closed by the order of the "government of the country at the time he named it ; and this "case is a direct authority that, if the war had broken out before "the consignee gave orders for the master to proceed to "Dunkirk, the consignee would have been bound to name "some other port than a French port as the port of discharge." That seems to me to be a very relevant part of the judgment. Those are the exact facts in this case except that we are not dealing with a charterparty but with a contract of sale. "It was, indeed, argued that, as it was known at the time

(1) L. R. 4 P. C. 181. (2) (1861) 1 B. & S. 773.

"when the orders were given at Falmouth that there was "great danger of war breaking out between France and Germany, "Dunkirk was not even then a safe port, and that the charterer "had no right to order the master to proceed there. Their "Lordships, however, are not of that opinion. They think "that, until the war was actually declared, the consignee was "entitled to require the master to proceed to Dunkirk ; and it "is to be observed that the master, when he received the orders, "made no objection to them, but proceeded on his voyage "to Dunkirk. The question to be determined is, what is the "effect of the named port becoming a closed port by reason "of war breaking out between the time when the orders are "given and the time when the ship arrives ? As their Lordships "have already given their opinion that the master was guilty "of no improper deviation or unreasonable delay in proceeding "to Dunkirk, they think the case, as to this branch of it, is "exactly the same as if the war had already broken out when "the vessel first arrived off Dunkirk. Now, on the one side "it is contended that, when once the consignee has named a "port which is an open and proper port at the time he names "it, the bill of lading and charterparty are to be read exactly "as if this was the only port of discharge named in them "— that is exactly the argument in this case—"on the other side "it is contended that, assuming the consignee committed no "breach of contract in giving orders to the master at Falmouth "to proceed to Dunkirk, yet, nevertheless, as in the event it "turned out to be impossible for the master to deliver at "Dunkirk, the consignee had not completely performed his "part of the contract to name a port at which the cargo could "be delivered, and that he was bound to select another "port from among those named in the charterparty. There is "no authority on the proper construction of the charterparty in "this respect, but their Lordships are of opinion, that they "ought not to hold that the contract between the parties has "become impossible of performance, and is, therefore, to be "treated as dissolved, if by any reasonable construction it can "be treated as still capable, in substance, of being performed. "Although it is true that the Court ought not to make a contract "for the parties which they have not made themselves, yet a "mercantile contract, which is usually expressed shortly, and "leaves much to be understood, ought to be construed fairly "and liberally for the purpose of carrying out the object of the "parties; and it would seem very unjust to hold, because the "consignee has named a port at which, without any fault on "the part of the shipowner, it is impossible for the cargo to be "delivered, that, therefore, the consignee is entitled to the "possession of the cargo at the nearest neighbouring port, "which in a charterparty framed like this, must necessarily "be one of the ports named in the charterparty, without "paying for the cargo any freight whatever. The ship, "without any breach of contract on the part of the shipowner, "has arrived at Dover; the consignee has required the master "to deliver him the cargo there, and he has not required the "master to proceed to any other port except Dunkirk, where "it was impossible for him to go. The charterparty provides "what freight is to be paid if the cargo is delivered at Dover, "and how it is to be paid; and, therefore, it appears to their "Lordships, that they ought to hold that the contract was not "dissolved by the impossibility of delivering the cargo at "Dunkirk, and that the shipowner had not lost his chartered "freight, nor his lien for it, at the time when the cargo was "demanded at Dover." It seems to me, applying that principle to a sale of goods, it would be wholly wrong—putting it the other way round perhaps—that the sellers should be deprived of their right to receive the price of the goods because the buyers have declared a port which was in effect a closed port at the time of the declaration.

The next case is *Waugh* v. *Morris*. (1) That was again a charterparty case. The facts as stated in the headnote were as follows: "By a charterparty made by defendant's "agent in France defendant chartered plaintiff's ship, and "it was stipulated that the ship should load a cargo of pressed "hay at T., in France, and proceed direct to London; and all "cargo was to be brought and taken from ship alongside. "Defendant's agent verbally told the master that the

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(1) L. R. 8 Q. B. 202.

"consignees would require the hay to be delivered at a "particular wharf in the port of London, to which the master "assented. On arriving in that port the master was unable "to land the hay at the wharf by reason of an Order in Council "under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United "Kingdom. The Order had been made before the charterparty was entered into, but neither party knew of it. After "some delay defendant received the hay from alongside the "ship into another vessel, and exported it. There was no "legal obstacle to doing this, but eighteen days were allowed "by the defendant to elapse beyond the lay days. The "plaintiff having brought an action for this detention of his "ship, the defendant contended that the contract was for an "illegal purpose, and therefore void." Blackburn J. in delivering the judgment of the Court, consisting of Cockburn C.J., himself and Mellor J., said this (1): "The "charterparty provides that the cargo was to be taken from "alongside; and that being so, the consignee might select "any legal and reasonable place within the port at which to "take it from alongside. He, by his agent in France, named "this wharf, which he supposed, erroneously, to be a legal "place, and the master, under the same mistake, assented "to this, as indeed he would have had no right to refuse, if it "had really been a legal place. But when it turned out that "the defendant had named a place for the performance of "the contract where the performance was impossible, because "illegal, that did not put an end to the contract, if the "performance in any other way was legal and practicable. "In the present case the performance by receiving the cargo "alongside in the river without landing it at all was both legal "and practicable: see *The Teutonia* (2), a case which would "have been precisely in point, if the Order in Council rendering "the landing illegal had come into operation after the contract "was made instead of before. It was on the fact that the "Order in Council existed at the time the contract was made "that the argument for the defendant was mainly grounded.

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(1) L. R. 8 Q. B. 206.

(2) L. R. 4 P. C. 171.

"It was said that the intention of both parties was, that the "hay was to be landed, that therefore they intended to violate "the law, and that it may be shown by extraneous evidence "that a contract, on the face of it perfectly legal, is void "because made with intent to violate the law, and that "ignorance of the law makes no difference. But we think, "in the first place, that it is a mistake to say that the plaintiff "intended that the hay should be landed. He no doubt "contemplated and expected that the hay would be landed, "for, except under very unusual circumstances, hay is not "brought into the Thames for any other object; but all that "the shipowner bargained for, and all that he can properly "be said to have intended, was that, on the arrival of the ship "in London, his freight should be paid, and the hay taken "out of his ship. If, unexpectedly, there had arisen a great "demand for hay abroad, like that which existed when our "army was in the Crimea, the consignee might have tran-"shipped the hay and exported it without the shipowner "having the slightest ground for complaining that his "intention was frustrated. We agree that a contract, lawful "in itself, is illegal if it be entered into with the object that the "law should be violated; if, as it is expressed in *Pearce* v. "*Brooks* (1), it is done for the very object of satisfying an "illegal purpose, or, as it is expressed in *McKinnell* v. "*Robinson* (2), 'for the express purpose of a violation of the "'law.' But in the present case the shipowner never did even "contemplate or believe that the defendant would violate "the law. He contemplated that the defendant would land "the goods which he thought was lawful; but if he had "thought at all of the possibility of the landing being "prohibited, he would probably have expected that the "defendant would in that case not violate the law. And he "would have been right in fact in that expectation, for the "defendant did not attempt to land the goods. We quite "agree that where a contract is to do a thing which cannot "be performed without a violation of the law it is void, whether "the parties knew the law or not. But we think, that in order

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(1) (1866) L. R. 1 Ex. 213. (2) (1838) 3 M. & W. 434, 442.

"to avoid a contract which can be legally performed, on the "ground that there was an intention to perform it in an "illegal manner, it is necessary to show that there was the "wicked intention to break the law; and, if this be so, the "knowledge of what the law is becomes of great importance." Later he said: "It seems to us that the mens rea is as "necessary to avoid a contract, which can be legally performed, "because when it was made it was with the object of satisfying "an illegal purpose, as it is to render the parties criminally "responsible."

I ought to have pointed out that in the statement of facts prepared by the original arbitrators there is this finding: When the buyers were asked the reason for the Bremen declaration the reply was to the effect "that they had on their "books sales to Bremen against which this purchase was "placed and the declaration was an innocent act. This is "quite feasible and in the absence of any evidence to the "contrary must be accepted." There is no finding that there was any desire or intention that the contract should be performed in an illegal way. I think that finding means that they did not appreciate that the declaration they were making was one which called for something which was unlawful, and as soon as they were advised that it was they withdrew it and made a fresh declaration.

The last passage I read from *Waugh* v. *Morris* (1) was read by Lord Roche in *Nash* v. *Stevenson Transport, Ld.* (2); the passage beginning: "We quite agree, that, where a "contract is to do a thing which cannot be performed without "a violation of the law it is void," and so on, was read and approved by him in the Court of Appeal.

There is one other case which I think throws some light upon the matter, and that is the case of *Borrowman, Phillips & Co.* v. *Free and Hollis.* (3) It is not quite in point but I think what was said is helpful. That was a sale of a cargo of maize, and the plaintiffs had tendered the cargo of the *Charles Platt*, which the defendants refused to accept on the

(1) L. R. 8 Q. B. 202, 208.

(2) [1936] 2 K. B. 128, 133.

(3) 4 Q. B. D. 500.

ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender was valid. The dispute was referred to an arbitrator who decided that the tender was invalid. The plaintiffs proceeded to make a second tender of a vessel called the *Maria D*, and that tender was made well within the contract time. It was refused by the buyers on the ground that having made one tender which was bad, the contract came to an end and the sellers had no right to make a second tender. It was held that the defendants were bound to accept the second tender, the *Maria D*, which was a tender against which no objection could be heard and a tender which was within the contract time. What was said by Bramwell L.J. (1) is I think helpful: " Suppose that a "clause had been inserted, that no ship was to be declared "whose shipping documents had not then arrived in England. "A clause of that kind would be repugnant to the theory "that the contract is to be treated as if the *Charles Platt* "had been the ship named in it. The case may be shortly "stated as follows: if the *Charles Platt* was a proper ship, the "plaintiffs were entitled to tender her cargo; if she was not, "they were entitled to withdraw the tender, and instead of the "cargo of the *Charles Platt* to offer that of the *Maria D.* The "defendants have relied upon *Gath* v. *Lees* (2), but the decision "is distinguishable. In that case cotton was ' to be delivered "' at seller's option in August or September, 1864.' The "seller elected to exercise that option in August, and notice "that it would be so exercised was accepted by the buyers. "The seller had a right to exercise that option; but in this "case, upon the defendants' hypothesis, the plaintiffs by "naming the *Charles Platt,* exercised their option in an "improper manner; therefore they had a right to withdraw "their tender, and to exercise it in a proper manner. That "case shows that this action is maintainable," and Brett and Cotton L.JJ. came to the same conclusion.

It seems to me that applying the principles of those cases to this case one arrives at the conclusion that when war broke out the buyers lost their right to declare Bremen or Hamburg but the contract did not come to an end as there still remained a legal way in which it could be performed; that the duty then resting upon them was to declare a legal port, that is either Rotterdam or Antwerp, and that when they made the declaration nominating Bremen, they did something they were not entitled to do. The declaration of Bremen could only become a term of the contract if it imposed a contractual duty on the sellers, but it was a nullity; it imposed no duty and it in no way became a part of the contract completing its last term. In my opinion that was a declaration they were not entitled to make and it had no more effect than if they had declared Timbuctoo. It being a bad declaration, in my view they were entitled to withdraw it and make the declaration which was made. Therefore, I answer the first two questions in the same way as the Appeal Committee have answered them.

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(1) 4 Q. B. D. 503.

(2) (1865) 3 H. & C. 558.

That being so, the third question does not arise because it is asked on the assumption that the sellers were entitled to treat the contract as cancelled. The question is whether the subsequent letters contained evidence of waiver or of a new contract. As it is asked, I suppose the question had better be answered. It seems to me that the true view is this. I think it is plain that if a declaration is made which is a bad one, even if the sellers had the right to refuse to accept an amended declaration, it was a right which they could waive, and would waive, if it suited them as if the price had gone down. Then the question would arise which is put so clearly during McCardie J.'s judgment in *Hartley* v. *Hymans.* (1) He had been referring to *Dudley, Clarke and Hall* v. *Cooper, Ewing & Co.* (2), and *Bentsen* v. *Taylor, Sons & Co.*(3), and he then said this: "The defendants (the charterers) "therefore had the right to repudiate. But instead of doing "so they wrote certain letters and did certain things which "I need not specify. Lord Esher M.R. said (4): 'She [the "'ship] did not sail till nearly a month afterwards, and there "'was a breach of the condition. The defendants had then

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(1) [1920] 3 K. B. 475, 492.
(2) Unreported.
(3) [1893] 2 Q. B. 274.
(4) Ibid. 279.

"'a right to treat the contract as at an end, or they could, "'if they chose, treat it as still subsisting. But, if they "'intended to treat the contract as at an end, it was their "'duty so to exercise their right as not to lead the plaintiff "'to believe that he was still bound by the contract.' The "test put by Bowen L.J. in that case was this (1): 'Did the "'defendants by their acts or conduct lead the plaintiff "'reasonably to suppose that they did not intend to treat the "'contract for the future as at an end, on account of the failure "'to perform the condition precedent, but that they only "'intended to rely on the misdescription as a breach of warranty, "'treating the contract as still open for further performance?'" Applying that principle the test would be this: After the declaration of October 3 of Antwerp did the sellers write or act in such a way by their letters or conduct as to lead the buyers reasonably to suppose that they did not intend to treat the contract as at an end? The declaration, as I have said, was on October 3. It is quite true in answer to the alternative declaration the sellers had still insisted that the contract was at an end. But after the declaration of Antwerp on October 3, there is silence for over three weeks which is a long time in a commercial contract, and then comes this postcard on October 25 with the heading which I have already read incorporating the word "Antwerp," which was of course the port which had been finally declared. The postcard says: "Owing to difficulty in obtaining freight, licenses, etc., we "claim protection under clause 8 of the contract." It is very difficult I think to escape the conclusion that buyers might well take it to mean: "We, after all, have accepted your last "declaration, but notwithstanding that we claim certain "protection under clause 8 of the contract," which of course is only of any value to them if the contract is still in existence. It does not rest there because there is silence for another five weeks, and it is not until November 30 that the sellers write a letter about which they obviously felt difficulty: "By our letter of the 25th October, we claimed, ex abundanti "cautela, in case our view of the law should prove to be

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(1) [1893] 2 Q. B. 283.

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"wrong, protection under Clause 8 of the contract." It is a great deal to try and read that into the letter of October 25, and it seems to me that it was quite open to the Appeal Committee on the issue of fact to take the view that the letter and the delay did amount to a waiver of their right, if there was a right, to refuse to accept the Antwerp declaration. I doubt whether it amounted to a new contract, but that is a matter of no importance. I think they were entitled to answer question three in the way that they did; that it was either one or the other and I am not prepared to differ from them in the view they took.

I decide that their answers were right, and the result automatically follows.

Award upheld.

Solicitors for sellers: *Crosse & Sons.*
Solicitors for buyers: *Parker, Garrett & Co.*

R. F. S.

C. A.
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July 4, 5, 15.

METROPOLIS ESTATES COMPANY, LIMITED *v.* WILDE.

Landlord and tenant—Lease—Bankruptcy of tenant—Disclaimer of lease by trustee in bankruptcy—Statutory provisions not complied with—Future rents not provable in bankruptcy—Tenant's liability not affected by his discharge from bankruptcy—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 54, *sub-s.* 3.

On December 9, 1935, A. took a lease of a flat for a term of seven years, from December 25, 1935, at a yearly rent of 200*l.*, payable quarterly in advance. On January 10, 1936, he was adjudicated bankrupt. On June 30, 1937, he obtained his discharge from bankruptcy. On October 27, 1939, the lessors instituted an action in the King's Bench Division against A., claiming 50*l.* in respect of one quarter's rent due in advance on September 29, 1939, under the lease. On February 2, 1940, the official receiver, as A.'s trustee in bankruptcy, without obtaining the leave of the Court, purported to disclaim A.'s interest under the lease :—

Held, affirming the decision of the Common Serjeant, that A.'s liability to the lessors remained unaffected, because they could not prove in bankruptcy for future rents, and, that being so, A.'s discharge from bankruptcy had no effect with regard to future rents under the lease.

Held, also, that there had been no valid disclaimer of the lease, because the trustee in bankruptcy had not complied with the provisions of s. 54, sub-s. 3, of the Bankruptcy Act, 1914, relative to getting the leave of the Court.

APPEAL from the Common Serjeant.

On December 9, 1935, the respondents demised to the appellant a flat known as No. 74, Cliffords Inn, for a term of seven years from December 25, 1935, at a yearly rent of 200*l.*, payable in advance by equal quarterly instalments of 50*l.* each on the usual quarter days. On December 6, three days before the date of the lease, a petition in bankruptcy was presented against the appellant. On January 9, 1936, a receiving order against him was made on the petition, and on January 10, he was adjudicated bankrupt, the official receiver being appointed the trustee in bankruptcy. On June 30, 1936, the appellant obtained his discharge, subject to its suspension for twelve months, so that it became effective on June 30, 1937. The appellant did not disclose to the official receiver his interest under the lease, and consequently no steps were taken to deal with that interest, either by way of disclaimer or otherwise. On October 27, 1939, the respondents instituted an action in the King's Bench Division against the appellant, claiming 50*l.* in respect of one quarter's rent due in advance on September 29, 1939, under the lease. When an application was made by them for leave to sign judgment under Order XIV., the appellant put in an affidavit, disclosing to them for the first time the facts with regard to his bankruptcy, and claiming that all future rent under the lease, subsequent to the adjudication, was a debt provable in his bankruptcy, and that by reason of his discharge he was released from all liability in respect of this future rent and also under the lessee's covenants in the lease. He was given leave to defend the proceedings, which were remitted to the Mayor's and City of London Court for trial.

On February 2, 1940, the official receiver as the appellant's trustee in bankruptcy, without getting the leave of the Court, purported to disclaim the appellant's interest under the lease. On March 4, 1940, the respondents amended their claim by claiming, in the alternative, that the 50*l.* constituted arrears of rent due under a tenancy from year to year. The tenancy from year to year was said to have been created by the appellant continuing in occupation of the flat and paying rent for it from January 10, 1936, the date of his adjudication, or alternatively from June 30, 1937, the date when his discharge in bankruptcy became effective. The Common Serjeant found in favour of the lessors and entered judgment against the lessee for 50*l.* and costs.

The defendant appealed. The appeal was heard on July 4 and 5, 1940.

I. H. Jacob for the appellant. On his adjudication as a bankrupt the appellant's interest in the lease became vested in the trustee in bankruptcy, and remained so vested until disclaimed by the trustee. That was never effectively done in this case. Sect. 18, sub-s. 1, of the Bankruptcy Act, 1914, shows the date on which the property of the bankrupt becomes vested in the trustee. The definition of "property" is set out in the definition section, s. 167. This property was acquired by the appellant before his adjudication, and the interest in it became vested in the trustee. It is a fallacy to say that on his discharge the interest in the lease re-vested in him. There is no ground for the proposition that on the adjudication of the appellant the interest in the property went to the trustee and the interest in the contract remained in him.

P. A. Devlin for the respondents. A landlord may sue on privity of contract or privity of estate, and a bankrupt's liability on the contract does not pass to the trustee in bankruptcy.

Future rents are not debts provable in bankruptcy, and s. 28, sub-s. 2, of the Act of 1914 provides that only debts provable in bankruptcy are released by an order of discharge. The debt on the covenant is a debt which remains on the bankrupt. In *Auriol* v. *Mills* (1) it was held that the bankruptcy of a lessee was no bar to an action on covenant brought against him, and that case has always been recognized as a principal authority on the subject.

In *Stacey* v. *Hill* (2) the trustee in bankruptcy disclaimed the lease, the bankrupt tenant was not in possession, and the landlord had the keys of the premises and could re-let them. In *John Betts & Sons, Ld.* v. *Price* (3), where the landlords allowed the tenant to assign the lease, on condition that their rights as to rent against the tenant were not interfered with, it was held that the landlords could recover rent against the tenant. He also cited *Boot* v. *Wilson* (4) and *Wadham* v. *Marlowe.* (5)

I. H. Jacob in reply. Once the appellant became bankrupt the whole of his property and estate became vested in the trustee, and if he does not validly disclaim a lease he becomes personally liable for the rent: *Wilson* v. *Wallani* (6); *Titterton* v. *Cooper.* (7) He also cited *Colles* v. *Hornsby.* (8)

Cur. adv. vult.

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(1) (1790) 4 T. R. 94.
(2) [1901] 1 Q. B. 660.
(3) (1924) 40 Times L. R. 589.
(4) (1807) 8 East, 311.
(5) (1784–5) 8 East, 314*n*.
(6) (1880) 5 Ex. D. 155.
(7) (1882) 9 Q. B. D. 473.
(8) [1913] 2 I. R. 210.

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METROPOLIS ESTATES CO. *v.* WILDE.

1940. July 15. MACKINNON L.J. Luxmoore L.J. will deliver the judgment of the Court (MACKINNON and LUXMOORE L.JJ. and TUCKER J.).

LUXMOORE L.J. On December 9, 1935, the Metropolis Estates Company, Ld. (hereinafter called "the lessors") demised to Max Simon Wilde and the British and International Press, Ld., a flat known as No. 74 Cliffords Inn. The demise was for the term of seven years from December 25, 1935, at a yearly rent of 200*l.* inclusive of service and the use of certain electrical appliances. This rent was payable in advance by equal quarterly instalments of 50*l.* each on the usual quarter days. The lease contained covenants by the lessees to pay the rents in the manner stated. At the date when this lease was executed Wilde and his wife were residing in the flat and they continued to reside there until December, 1939.

On December 6, 1935, three days before the date of the lease, a petition in bankruptcy was presented against Wilde, the act of bankruptcy relied on being the failure to comply with a bankruptcy notice on or before November 25, 1935. On January 9, 1936, a receiving order against Wilde was made on the petition and on January 10, 1936, he was adjudicated bankrupt, the official receiver being appointed the trustee in the bankruptcy. On June 30, 1936, Wilde obtained his discharge, subject to its suspension for twelve months, so that the discharge became effective on June 30, 1937. Wilde did not disclose to the official receiver his interest under the lease of December 9, 1935, and consequently no steps were taken to deal with that interest, either by way of disclaimer or otherwise, but in law Wilde's interest in the lease vested in the official receiver on the adjudication. On October 27, 1939, the lessors instituted an action in the King's Bench Division against Wilde, claiming 50*l.* in respect of one quarter's rent due in advance on September 29, 1939, under the lease. When an application was made by the lessors for leave to sign judgment under Order XIV., Wilde put in an affidavit disclosing to the lessors for the first time the facts with regard to his bankruptcy, and claiming that all future rent under the lease, subsequent to the adjudication, was a debt provable in his bankruptcy, and that by reason of his discharge he was released from all liability in respect of this future rent and also under the lessee's covenants in the lease. Wilde was given leave to defend the proceedings, which were remitted to the Mayor's and City of London Court for trial.

On February 2, 1940, the official receiver as Wilde's trustee in bankruptcy purported to disclaim Wilde's interest under the lease of December 9, 1935. On March 4, 1940, the lessors amended their claim against Wilde by claiming, in the alternative, that the 50*l.* constituted arrears of rent due under a tenancy from year to year of the flat, 74 Cliffords Inn. The tenancy from year to year was said to have been created by Wilde continuing in occupation of the flat and paying rent for it from January 10, 1936, the date of his adjudication, or alternatively from June 30, 1937, the date when his discharge in bankruptcy became effective. The suit came on for hearing before the Common Serjeant on April 17, 1940. Wilde set up a number of defences. First, he claimed that his trustee in bankruptcy had disclaimed his interest in the lease of December 9, 1935, and he was thereby released from any further liability thereunder. Secondly, that the lessors' claim against him was provable in his bankruptcy and he was by reason of his discharge on June 30, 1937, released from all liability in respect thereof. Thirdly, he denied that he had become a tenant from year to year in respect of the premises and contended that it was impossible for such a tenancy to be created having regard to the continued existence of the lease. This contention is clearly correct and I do not propose to refer to it further : indeed the point was not pressed by the lessors in this Court. The Common Serjeant in a reserved judgment found in favour of the lessors and entered judgment against Wilde for 50*l.* with costs on the High Court scale down to the date of remission and from that date with costs on the C2 scale. Wilde has appealed to this Court from this decision and Mr. Jacob on his behalf has put forward the same contentions as were put forward in the Court below.

There is, in our judgment, no substance in either of the first two points raised. There has been no valid disclaimer of the lease, because there has been no compliance with the statutory provisions relating to disclaimer. Such provisions are contained in s. 54 of the Bankruptcy Acts, 1914 and 1926. By sub-s. 1 of this section it is provided that: "the trustee ". . . . subject to the provisions of this section, may, by "writing signed by him, at any time within twelve months "after the first appointment of a trustee or such extended "period as may be allowed by the Court, disclaim" any onerous property: "Provided that, where any such property "has not come to the knowledge of the trustee within one "month after such appointment, he may disclaim such "property at any time within twelve months after he has "become aware thereof." By sub-s. 3 it is provided that: "a trustee shall not be entitled to disclaim a lease without "the leave of the Court except in any cases which may be "prescribed by general rules and the court may before or on "granting such leave require such notices to be given to "persons interested and impose such terms as a condition of "granting such leave and make such orders with respect to "fixtures . . . . and other matters arising out of the tenancy "as the court thinks just." Under r. 276 of the Bankruptcy Rules, 1915, being the rules referred to in sub-s. 3 of s. 54, to which reference has already been made, it is provided by sub-r. 1 that a lease may be disclaimed without the leave of the Court in a number of specified cases which admittedly do not cover Wilde's interest in the lease, while by sub-r. 2 it is provided that: "except as provided by this Rule the "disclaimer of a lease without the leave of the Court shall "be void." It is plain, therefore, that the attempted disclaimer of February 2, 1940, was void and Wilde's interest in the lease still remains vested in the official receiver. The position of the official receiver with regard to that interest is the same as if it had been assigned to him by Wilde and so long as that interest remains vested in him he appears to remain liable for rent by privity of estate, but he is under no liability in respect of Wilde's contract with the lessors: see *Hopkinson* v. *Lovering*. (1)

The question therefore remains whether Wilde's liability to the lessors by privity of contract remains unaffected. It was said it had disappeared because the liability for all future rent under the lease was a debt provable in Wilde's bankruptcy and that when his discharge took effect he was released from that liability. The fallacy in this argument is that the premise on which it is based, namely, that the lessors were entitled to prove in Wilde's bankruptcy for all future rent under the lease is without foundation, for where a lessor is seeking to prove against a bankrupt lessee's estate in respect of an existing lease he can only prove for the arrears of rent due and the breaches of covenant which have taken place up to the time of proof: see *In re New Oriental Bank Corporation* (*No.* 2). (2) This being so, Wilde's discharge had no effect with regard to future rent under the lease, for it is provided by s. 28, sub-s. 2, of the Bankruptcy Acts, 1914 and 1926, that an order of discharge shall release the bankrupt from all debts provable in bankruptcy with certain exceptions specified in sub-s. 1, which are not material to be mentioned in the present case. As already pointed out, future rent is not a debt so provable and consequently the liability for it remained unaffected in Wilde at all material times.

For these reasons we are satisfied that Wilde remained liable to the lessors by privity of contract as one of their original lessees in respect of the quarter's rent of 50*l.* which became payable under the lease on September 29, 1939, and that the Common Serjeant's judgment directing Wilde to pay this sum to the lessors was correct and ought to be affirmed. The appeal will, therefore, be dismissed. The appellant must pay the respondents' costs of the appeal.

Appeal dismissed.

Solicitor for the appellant: *Arnold A. Finer.*
Solicitor for the respondents: *Bernard Ashley Hill.*

(1) (1883) 11 Q. B. D. 92.

(2) [1895] 1 Ch. 753.

P. J. B.

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July 18, 19, 22;
Aug. 8.

BELL PROPERTY TRUST, LIMITED *v.* ASSESSMENT COMMITTEE FOR THE BOROUGH OF HAMPSTEAD.

Rates—Block of service flats—Whether deduction of cost of service to be made before arriving at gross value—Allowances for profit on services and maintenance of parts not demised—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 4.

The appellants were the owners of a block of flats, let to tenants under agreements providing for payment by the tenant of a comprehensive sum, described as rent, for the occupation of the flat and the benefit of the services and amenities such as constant hot water, central heating, etc., provided by the appellants for all their tenants:—

Held, by the Court of Appeal, that the cost to the appellants of providing the services was deductible from the gross payments by the tenants before arriving at the gross value of each flat for insertion in the valuation list, and that such deductions might properly include—(*a*) an allowance for a reasonable profit to the appellants on the provision of such services, and (*b*) the cost of repairs to and maintenance of the parts of the building not demised to tenants, such as passages, stairs, lifts, and staff rooms.

Decision of the Divisional Court reversed.

Pullen v. *St. Saviour's Union* [1900] 1 Q. B. 138 overruled.

APPEAL from the Divisional Court.

At the county of London quarter sessions in March, 1939, the appellants, Bell Property Trust, Ld., appealed against the decision of the assessment committee for the borough of Hampstead with respect to the assessment of one hundred and twenty-three hereditaments, the property of the appellants, included in the supplemental valuation list of the borough. The total gross and rateable values of 8561*l.* and 5728*l.* respectively appearing in the supplemental valuation list had been reduced by the assessment committee to 7702*l.* and 5060*l.* respectively. Quarter sessions further reduced the assessments to 7085*l.* gross and 4655*l.* rateable, and stated a case for the opinion of the Court.

The following summary of the case, which was of great length, with a number of detailed schedules and figures, is sufficient for the purposes of this report, as showing how the questions of principle argued and decided arose.

The appellants were the owners of a block of flats known as

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"Eton Rise." Each of the one hundred and twenty-three flats in the building (which were the one hundred and twenty-three hereditaments in question) was let or to be let under tenancy agreements whereby the tenant paid a comprehensive sum, described as rent, for the occupation of the flat and the benefit of the services and amenities provided by the appellants, such as constant hot water, central heating, and other services usually provided by the landlords of high class service flats.

The appellants had compounded and were rated, and the question at issue in the appeal was the proper method of arriving at the gross values, as defined by s. 4 of the Valuation (Metropolis) Act, 1869 (1), of the separate hereditaments. In particular the question was raised whether the cost of providing the services and amenities was deductible from the gross payments made to the appellants by the tenants before arriving at the gross value, or whether the Court was bound by *Pullen* v. *St. Saviour's Union* (2) to hold that the entire payment by the tenant must be treated as rent for the purpose of arriving at the gross value, such deductions only as were permissible under the Schedule to the Valuation (Metropolis) Act, 1869, being made from that gross value to ascertain the rateable value.

Assuming that the appellants were entitled to make the deductions before arriving at the gross value, further specific questions were raised as to the admissibility in principle of a sum of 932*l.* representing profit on the annual payment for services, and of a sum of 534*l.* in respect of the cost of repairing and maintaining those parts of the buildings not demised to tenants, such as passages, stairways, and lifts, staff rooms, etc. (The figures were agreed, subject to the question of principle.) Quarter sessions allowed the appellants' claims as to these

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(1) By Valuation (Metropolis) Act, 1869, s. 4: "The term 'gross "'value' means the annual rent "which a tenant might reasonably "be expected, taking one year "with another, to pay for an "hereditament, if the tenant "undertook to pay all usual "tenant's rates and taxes, and tithe "commutation rent charge, if "any, and if the landlord under-"took to bear the cost of the "repairs and insurance, and the "other expenses, if any, necessary "to maintain the hereditament in "a state to command that rent."

(2) [1900] 1 Q. B. 138.

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and certain other items, but the Divisional Court, reluctantly (as each member of the Court stated) held that it was bound by *Pullen* v. *St. Saviour's Union* (1) to hold that the cost of the services must be included in the rent which the hypothetical tenant would pay, and was therefore not deductible in order to arrive at the gross value. They accordingly allowed the assessment committee's appeal and restored their figures. The appellants appealed to the Court of Appeal. The appeal was heard on July 18, 19, 22, 1940.

Sydney Turner K.C., *Blanco White K.C.* and *Dutton Briant* (for *Springman*, on war service) for the appellants. The respondents arrived at the gross value by aggregating the rents for the whole building and then deducting from the gross sum a percentage in respect of services. This was accepted by the appellants as complying with the Valuation (Metropolis) Act, 1869. Until the case came before quarter sessions, the question of principle was not in dispute. The respondents then sought to rely on *Pullen* v. *St Saviour's Union* (1), in which it was held that the cost of lighting and cleaning the staircase must be added to the rent in order to arrive at the gross value as defined in the Valuation (Metropolis) Act, 1869, s. 4. (2) In this court it is open to us to submit that *Pullen's* case (1) was wrongly decided. That decision was based on a fallacy, through a confusion between the increased value of the hereditament itself owing to the extra services provided, and the cost of the actual services. The real question is not the value of the hereditament to the landlord, but to the tenant. The gross value for this purpose only includes the expenses necessary to maintain the hereditament in a state to command the rent (Valuation (Metropolis) Act, 1869, s. 4 (2)). There are here two hereditaments: first, the flat itself in the tenant's occupation, and secondly, the common staircase in occupation of the landlord. The expense of lighting and heating the staircase is not necessary to maintain the tenant's hereditament in a state to command the rent. It was wrongly assumed in *Pullen's* case (1) that the staircase was part of the hereditament, whereas it was outside it, being for the purpose of access only and the tenant having only the right to use it. The rateable value is not affected by the supply of those amenities. In *White Bros.* v. *South Stoneham Union Assessment Committee* (1) it was held that the cost of dredging the access to a shipyard was not an expense necessary to maintain the hereditament (the shipyard) in a state to command the rent. That case was decided under the Parochial Assessments Act, 1836, but the words there were substantially the same as in the Valuation (Metropolis) Act, 1869, s. 4. (2) The principle of *Pullen's* case (3) is doubted in the text books: see Ryde on Rating, 7th ed., p. 232. Even if that case, which has never been followed, was rightly decided, it is distinguishable. The thing to be valued is the hereditament, namely the flat. The common parts are not part of the occupied hereditament. All the tenants have in respect of them is an easement, which is not rateable. It may be that these common parts are not rateable at all because there is no exclusive occupation of them. Obviously no one would take a flat to which there was no access, but the fallacy consists in saying that the cost to the landlord of maintaining access and the other amenities should be added to the gross rent. What is the gross rent is a question of fact, as Lord Halsbury said in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.* (4) In *Pullen's* case (3) it is by no means clear that Channell J. thought that the sixpence a week charged for lighting and cleaning the means of access should be included in the rent. The question is, how much would the tenant pay as rent for the hereditament having regard to the fact that the amenities are available, but that has no relation to the cost of the amenities to the landlord. One does not include the cost of maintaining Hyde Park in an assessment of adjoining property merely because its existence enhances the rent of houses overlooking it.

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(1) [1900] 1 Q. B. 138.

(2) Ante, p. 544.

The following Scottish cases were referred to: *Wright* v.

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(1) [1915] 1 K. B. 103.

(2) Ante, p. 544.

(3) [1900] 1 Q. B. 138.

(4) [1901] A. C. 175, 180.

Glasgow Assessor (1); *M'Ewan* v. *Glasgow Assessor* (2), and *Will* v. *Glasgow Assessor* (3) on the question of an allowance of profit to the landlord in respect of the provision of the services.

Comyns Carr K.C. and *Michael Rowe* for the respondents. *Pullen* v. *St. Saviour's Union* (4) was rightly decided and applies here. These expenses are necessary to maintain the hereditament in a state to command the rent, and are therefore deductions from gross to rateable, but not otherwise. The whole is one enterprise, although some of the liabilities are outside the actual hereditament. The sole test is whether these expenses are necessary, in a broad sense, to command the rent. Heating, lighting and hot water are provided in these flats, and no tenant would or could take a flat without them. This cost cannot properly be deducted in arriving at the gross value. [They referred to *Rex* v. *Adames* (5) and *Reg*. v. *Inhabitants of Vange*. (6)] By the Rating and Valuation Act, 1925, s. 68, the value of services rendered by the landlord "other than the provision of, or repairs to, or maintenance "of, the hereditament" is not to be taken into account in estimating the annual rental value of a hereditament to a tenant. On the other hand, it is not necessary that the acts of maintenance in order that the hereditament should command the rent should be done on the hereditament: see *Reg*. v. *Gainsborough Union* (7), where the expense of outside drainage works, without which the hereditament would at times have been flooded and therefore greatly reduced in value, was held to be an expense necessary to maintain the hereditament in a state to command the rent. That is exactly analogous to the present case. It is something done off the hereditament in order to produce a result on the hereditament in respect of which the tenant pays rent. It need not necessarily be something which appears in the tenancy agreement. A flat with hot water laid on and central heating maintained by outside boilers would be useless or of much less value without those boilers, the maintenance of which, therefore, is necessary to command the rent. *Reg.* v. *Smith* (1) was cited in *White* v. *South Stoneham Assessment Committee.* (2)

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(1) 1936 S. C. 344, 352.
(2) 1937 S. C. 511, 516.
(3) 1937 S. C. 518, 523–4.
(4) [1900] 1 Q. B. 138.
(5) (1832) 4 B. & Ad. 61.
(6) (1842) 3 Q. B. 242.
(7) (1871) L. R. 7 Q. B. 64.

In valuing any hereditament account has to be taken of any easement enjoyed with it or in respect of which it is the servient tenement. If, for example, the right to receive tolls is attached to the occupation of a hereditament the value of the tolls may be an important element in arriving at the value of the hereditament. The principle is that one values not only bricks and mortar, but also the advantages which necessarily go with occupation of the hereditament. As Channell J. said in *Pullen* v. *St. Saviour's Union* (3): "The "rent of every tenement includes as one of the elements of "its value the character of the access to it."

It follows that any expense incurred by the landlord in maintaining the property over which he has granted the easement is an expense of maintenance. *Pullen's* case (3) we submit was rightly decided, and did not go as far as some earlier cases. It is instructive to contrast the scale of allowances in Sch. II., Part I, of the Rating and Valuation Act, 1925, with that in the Valuation (Metropolis) Act, 1869. The limits in the Act of 1925 made it necessary to exclude *Pullen's* case (3) by the proviso to s. 68 to avoid a real injustice to flat owners. In London there was no such necessity and *Pullen's* case (3) was left standing. *Waddle* v. *Sunderland Union* (4) and *Appenrodt* v. *Central Middlesex Assessment Committee* (5) show that any payment necessary to maintain the hereditament may be deducted from the gross value though it has no physical attributes whatever.

It is submitted that the group of cases cited establish the following propositions: (1.) Under the definition of gross value in s. 4 of the Act of 1869 the landlord must be assumed to bear the cost of all repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a condition to command the rent. Therefore, no deduction in respect of these matters can be made from the gross payment in order to arrive at the gross value. (2.) The expression "repairs "and insurance, and the other expenses, if any," must have the same meaning in the definition of gross value itself as in the definition of the deductions from gross to rateable. Therefore, any authority as to the meaning of that expression for one purpose is equally applicable to its meaning for the other purpose. (3.) The repairs, insurance and other expenses are not confined to those incurred on the hereditament itself, but include those incurred elsewhere for the benefit of the hereditament or the maintenance of its value. (4.) Therefore, they are not confined to expenses physically affecting the hereditament, but include expenses tending to maintain its value for the purpose of occupation, in addition to its physical condition. (5.) The value of the hereditament includes any additions due to easements or other benefits in fact enjoyed therewith by reason of the occupation of the hereditament, just as it may be diminished by easements in respect of which the tenement is servient or disadvantages due to surrounding circumstances or rights of other people. (6.) Therefore, the repairs, insurance and other expenses include expenses necessary to be incurred by the landlord whether on or off the premises in order to maintain the value of the premises to the tenant. It is immaterial whether those payments were made under contract or otherwise.

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(1) (1885) 55 L. J. (M. C.) 49.
(2) [1915] 1 K. B. 103.
(3) [1900] 1 Q. B. 138, 142.
(4) [1908] 1 K. B. 642.
(5) [1937] 2 K. B. 48.

Pullen v. *St. Saviour's Union* (1) is dependent on all those propositions and supports all of them. All the matters in the present case are within the principles of that case.

If the Court is against us on the question of general principle, there remains an alternative argument on the question whether anything is allowable in respect of profits before arriving at the gross value. It is said that, though there is one person or company which runs these flats, one is to assume for rating purposes that there are two persons, one of whom lets a mere shell, with no possibility of heating, hot water, etc., and the other from whom the landlord buys hot water, etc., for the purpose of re-selling to the tenant. The argument is that the contractor would require a profit, and therefore that in

(1) [1900] 1 Q. B. 138.

making a deduction from gross payment to gross value, one must allow for this profit. But the notion of profit is fundamentally unsound. It is one business with one profit consisting of the total rents of the flats, less the cost of providing and maintaining them.

[CLAUSON L.J. If of two otherwise equally good flats—(A) has constant hot water and (B) has not, is not the question "How much more would the tenant pay for (A) than (B)? and must you not allow for an element of profit?" If the landlord did not provide it, the tenant would have to get some one else to do so, and that person would not do it gratis.]

No, you may have a hypothetical tenant, or a hypothetical landlord, but not a hypothetical hereditament.

No assistance is to be derived from the Scottish cases cited against us. It is not a question of fact, but of law, whether a profit should be allowed.

They referred to *Gateshead Assessment Committee* v. *Redheugh Colliery, Ld.* (1)

As to the allowance claimed of 534*l.* for repairs to the common parts of the building, this is covered by the deduction from gross to rateable, and, if allowed before arriving at the gross value, would be made twice over.

Sydney Turner K.C. replied.

Cur. adv. vult.

1940. Aug. 8. The judgment of the Court (SCOTT, CLAUSON and GODDARD L.JJ.) was read by GODDARD L.J. This appeal arises out of a special case stated by London quarter sessions on an appeal by the present appellants against the decision of the respondent assessment committee regarding the assessment of one hundred and twenty-three flats in a block known as "Eton Rise," of which the appellants are the owners. The appeal related solely to the gross value of the hereditaments, that is to say, the annual rent which a tenant might reasonably be expected, taking one year with another,

(1) [1925] A. C. 309.

to pay for a hereditament (in this case any one of the individual flats, as each must be assessed separately), if the tenant undertook to pay all usual tenant's rates and taxes, and if the landlord undertook to bear the cost of repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to demand that rent—Valuation (Metropolis) Act, 1869, s. 4 (1)—and the question is how is the gross value to be ascertained ?

Now the difficulty, if difficulty there be, is one which is familiar to every one of experience in rating law. The definition is, in substance, taken from the Parochial Assessment Act, 1836, which in turn gave statutory authority to the method of valuation which had been generally adopted for many years before that Act was passed. When rateable hereditaments consisted only of houses, mills, shops, farms, and such like properties, the ascertainment of annual value was comparatively simple, but changing conditions in industrial and social life brought about many complications, and to apply this definition to railways, sewers, gasworks, and other public utility undertakings was difficult in the extreme. Parliament, however, gave no assistance, in spite of appeals from the courts, to clarify the position by legislation, but preserved the definition in further Acts, such as the one which we are now considering, the Union Assessment Committee Act of 1862, and indeed, in the recent Act of 1925, which, while effecting many great and fundamental changes in rating practice and law, left this matter unaltered. Accordingly, the ingenuity of rating surveyors was directed to devising various methods and formulæ whereby a notional annual value could be attributed to rateable properties which in fact could have no annual value in the ordinary sense, and as the courts gave their approval to these methods, which from their nature could only be highly artificial, so they took their place in the law of rating. Thus was evolved, to take only two instances, the "contractor's theory," as it is called, and also the "profits basis" for public utility corporations with property in more than one parish.

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(1) Ante, p. 544.

The development of flats as a normal class of dwelling both in London and the provinces brought other problems, and that with which we are now concerned arises from the fact that modern flat dwellers expect, and owners vie with each other in providing, a variety of services and amenities unknown to an earlier generation. Whereas the provision of a lift and the attendance of a porter in uniform may have been all the service that was usually furnished by a flat owner thirty years ago, constant domestic hot water, central heating, a tastefully laid out garden, radio relayed to each flat from a station in the building, and perhaps a swimming-pool, are nowadays among the attractions which may be, and often are, offered to a prospective tenant. In some cases which have come before the courts, usually in connection with service flats, separate agreements, stipulating for separate payments, are made with regard to certain of these amenities, and in others, as in the present case, the tenant pays a gross sum which includes the rent and the privilege of enjoying the services and amenities provided.

In the present case the owner, having compounded, was rated, and the question in issue in respect of each flat was at what figure it should be assessed. While it does not follow that the actual rent paid by a tenant is the legal measure of the rent which the hypothetical tenant would pay, no question of this sort arises here, as the surveyors on both sides evidently considered that the actual rents reserved were what a hypothetical tenant would be willing to pay, and the questions raised by the special case turn entirely on the issue as to what portion of the gross sums payable by the tenants was actually for rents and how much was remuneration for services, or consideration for services and amenities provided for the tenants by the landlord.

We have already pointed out that the methods to be applied for valuing classes of hereditaments, which were unknown at the time of the Act of 1836 are for the most part the result of theories applied by rating surveyors which in whole or in part have received the sanction of the Courts as best calculated to arrive at a fair result compatible with

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the statutory definition. We lay some emphasis on this point, because it appears in the present case that the experienced surveyors who represented the respective parties agreed in principle that the proper method was to find out the value of the services and amenities offered, and to deduct them from the gross sum which the tenant pays, leaving the balance to represent the true value of the flat. We have no doubt that in so doing they were adopting a method generally applied by their profession, and, be it observed, the assessment committee was also content that this method should be applied: "Communis opinio," said Lord Ellenborough in *Isherwood* v. *Oldknow* (1), "is evidence of what the law is."

The difference that arose was not as to method, but as to particular items, claimed by one side, but resisted by the other, as legitimate deductions before arriving at the gross value. But when this appeal came before the quarter sessions, Mr. Comyns Carr, for the respondents, submitted that none of the items could be deducted to ascertain the gross rental, but could only be deducted, if at all, as "other expenses . . . . "necessary to maintain the hereditament in a state to command "that rent." He contended that this followed from the decision in *Pullen* v. *St. Saviour's Union.* (2) The quarter sessions did not give effect to this contention, possibly because they thought the case distinguishable, but they stated the present case, and the Divisional Court, on this point being taken before them, held that they were bound by the decision. This meant that the gross rental had been ascertained on wholly wrong principles, and accordingly, they allowed the appeal, and restored the valuation of the assessment committee; and as there was no cross-appeal, it seems to follow that was all they could do, although in fact the assessment committee had applied a method which the Court felt constrained to hold was wrong. From the judgments it appears that the Court followed *Pullen's* case (2) with reluctance, and expressed doubt whether it was rightly decided, and the first question we have to determine is whether the judgment is right or should be overruled.

(1) (1815) 3 M. & S. 382, 396.

(2) [1900] 1 Q. B. 138.

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Now it is to be observed that *Pullen's* case (1) has never been followed, and learned authors on this branch of the law have expressed doubts as to its correctness. Charles J., in the court below, said it appeared to be contrary to what he had always believed to be the law, and we must see exactly what the court in that case decided. The facts were that working-class tenements were let to tenants at rents of 8*s*. 6*d*. to 10*s*. a week. Each tenant, on taking a tenement, was told that he would have to pay 6*d*. per week to the landlord's collector, in addition to the rent, and out of these sixpences the collector arranged for the cleaning and the lighting of the staircase. Quarter sessions held that the 6*d*. ought to be regarded as part of the rent and the Court upheld them. In our opinion, the decision was wrong and the law is correctly stated in the argument for the appellant which is clearly and concisely set out in the report. A tenant, knowing that he would have to pay this levy of 6*d*. a week, would take that into account when considering what rent he could afford to pay, and we can see no ground for holding that the 6*d*. was part of the rent and not payment for services. We think this case should be overruled.

We, therefore, approach the present case unfettered by that decision. Here we have a gross sum paid by the tenant not only for the occupation of the flat, but also for the various services and amenities provided. We can see no difference in principle between such a case as this and the letting of a furnished flat. In the latter case the law is well settled that you must ascertain how much is paid in respect of the furniture and the things in no way forming part of the rateable premises, such as rates, which are usually paid by a landlord who lets furnished, and the remainder represents the rent of the house itself, for which it is rateable: *Reg.* v. *Lee.* (2) Exactly to the same effect is Lord Fleming's opinion in *M'Ewan* v. *Glasgow Assessor* (3), where the question for decision was much the same as in the present case. He said: "The "yearly rent or value of a flat . . . . was the proportion of

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(1) [1900] 1 Q. B. 138.
(2) (1866) L. R. 1 Q. B. 241.
(3) 1937 S. C. 511, 514.

"the gross rent paid to the owner which could fairly be "attributed to the occupation of the heritable subject." Having then pointed out that the gross rent, by which he means the actual sum paid by the tenant, includes various services, he continues: "The tenants periodically pay a lump sum for the "personal services and for the use of the heritable subject, and "the problem, accordingly, is to ascertain the proportion of "the cumulo payment which effeirs to the heritable subject." From these cases, with which we entirely agree, it appears that not only did the rating surveyors and the assessment committee approach the problem correctly, but so did quarter sessions. They set out to find what proportion of the sums reserved by the leases as rent represented the value of the services and amenities provided by the lessors, and deducting that and the rates, the balance left represented the true gross value. The hypothetical tenant, of course, is not concerned with what it costs the landlord to provide these services; he considers only what he can afford to pay for the sum of what he gets, that is, a flat to live in, together with such services and other attractions as may be offered. A man who feels he can pay a rent of about 250*l.*, and has been paying that in an old-fashioned flat with open fireplaces, and where the water has to be heated in the kitchen, may well feel that he can pay, say, 275*l.* or 300*l.* for one in which he will be provided with domestic hot water and central heating. He would not concern himself with what it cost the landlord to provide those services, but it is none the less true that what he pays for the use of the flat itself is the rent reserved less a proper remuneration to the landlord for providing him with hot water at his taps and in his radiators. The question, therefore, before quarter sessions was essentially one of fact, and it is not for this Court to interfere with their findings on amount, provided they have directed their minds to the proper question, unless indeed they have taken into account some matter or expense which they ought not to have done. Mr. Comyns Carr, for the respondents, challenged in particular two sums which the quarter sessions allowed by way of deduction. The first was the sum of 932*l*. representing profit on the annual payment for services. Quarter sessions allowed this deduction on the ground that the landlords would not provide these services and amenities for the bare cost, but would want a return on their outlay. That seems very reasonable, and was one of the items allowed by the Court of Session in the case to which we have referred. In any case, it is one of the matters which the Court had to take into account in asking themselves how much of the gross sum received by the landlords, and paid by the tenants, represents payment for the actual occupation of the flat. We see no ground for saying that quarter sessions were not entitled to allow a sum for profit in considering what was a proper remuneration to the owner, and the amount was entirely a matter for them. The other sum challenged was 534*l*., which represents the cost of repairs to what Mr. Comyns Carr called the common parts, for instance, repairs to the approach roads and decoration of stairs and passages. The objection taken to these being allowed was that as deductions for repairs had to be allowed to ascertain the rateable value, it meant that the rateable occupiers, that is, the appellants, would be getting the deduction twice over. But that is not so. To ascertain the rateable value a deduction of 34·3 per cent. from the gross value has been made, and no complaint is now made as to this. As the costs of these repairs was deducted in arriving at the gross rental, they form no part of the sum on which this percentage has been taken, so they have not been deducted twice, and we think they are matters which quarter sessions might properly take into account in ascertaining the true gross rental.

In their notice of appeal the appellants sought to challenge the decision of quarter sessions in refusing to allow the amount claimed by them as interest on installations and also in deducting rates at only 12*s*. 8*d*. in the £ instead of 13*s*., but Mr. Turner abandoned both these claims before us, and there is no need, therefore, to deal with them.

We therefore answer the question propounded in the case in the affirmative. The appeal is allowed, and the decision of the court of quarter sessions is confirmed.

Appeal allowed.

[Two other appeals by the same appellants against the Wandsworth Borough Assessment Committee were also allowed, as being indistinguishable in principle from the Hampstead case.]

Solicitors for the appellants: *Simmons & Simmons.*

Solicitors for the respondents: *P. H. Harrold, Town Clerk, Hampstead.*

J. W. H.

1940
June 27, 28.

SMITH *v.* COX.

Landlord and tenant—Rent—Payment by stranger to tenancy—Acceptance by landlord—Payment not ratified by tenant—Satisfaction.

Payment to a landlord by a stranger to the tenancy of a sum equivalent to the amount of the rent owing by the tenant is not a good satisfaction of the rent, even if it be accepted by the landlord, unless it is made by the payer as agent for, and on behalf of, or in the name and on account of, the tenant, or with his authority or subsequent ratification.

Dictum of Parke B. in *Simpson* v. *Eggington* (1855) 10 Exch. 845, 847, applied.

ACTION tried by Humphreys J. without a jury.

The plaintiff, Cecil Smith, was at all material times the tenant of premises known as "Queensgate," South London Road, Maidstone, of which a Miss Rolf was the landlord. The defendant, Walter Cox, was an estate agent and valuer, and also a certificated bailiff who acted as the agent of the landlord to collect the rent. The plaintiff was in arrears with the rent to the extent of 260*l.*, being three and a quarter years' rent at 80*l.* per annum, his failure to pay being due to his belief that he was entitled to withhold the rent because the landlord had failed to execute certain repairs. Miss Rolf, an elderly woman, was in bad health and poor financial circumstances, and the defendant, knowing that she was largely dependent on the rent of the house, had, as the rent became due, sent her out of his own pocket a sum equivalent to the amount of rent which was owing, trusting to recoup himself out of the rent when it was paid by the plaintiff. When he failed to obtain the rent from the plaintiff, he put in a distraint and recovered 180*l.*, the amount agreed to be due for rent less certain deductions for repairs. The plaintiff now sued the defendant for damages, contending that the distraint was unlawful because the rent had been paid by the defendant. The plaintiff admitted that the payments were made by the defendant without his knowledge and not at his request.

R. J. White for plaintiff. Rent is payable in respect of the land, and it does not matter who pays it so long as it is paid: see Coke on Littleton, 18th ed., vol. ii., s. 335. The ordinary rule that a payment made by a stranger is not a good satisfaction of a debt does not apply to rent. The payments made to the landlord by the defendant were payments of rent, and it is immaterial that the defendant paid them out of kindness to the landlord or for any other reason. He has paid the rent, and there is, therefore, no rent owing and no right to distrain.

Gilbert Paull K.C. and *B. H. Waddy* for the defendant. A landlord is not bound to receive rent at the hand of a stranger, and, if he accepts it, it is only good satisfaction if it be paid in the name and with the authority of the tenant. In *Grymes* v. *Blofield* (1) it was held that "satisfaction is no plea if it "accrues from a stranger." The defendant is a complete stranger to the contract between the landlord and the plaintiff. In *Simpson* v. *Eggington* (2) Parke B. thus stated the law: "The general rule as to payment or satisfaction by a third "person, not himself liable as a co-contractor . . . . appears "to be, that it is not sufficient to discharge a debtor unless "it is made by the third person, as agent, for and on account "of the debtor and with his prior authority or subsequent "ratification." Here there has been no subsequent ratification.

HUMPHREYS J. [after stating the facts:] Mr. White, for the plaintiff, has argued that the law is—and he says it is so stated by Sir Edward Coke in his comments on the work of Littleton—that if a stranger pays the rent of a tenant to the landlord, and the landlord accept it, it is a good payment. It would not be so, he agrees, if it were a payment made in respect of any other form of debt. I have looked at the passage in the ancient, but still valuable, work which I have mentioned to see what the law was in the reign of James I. What is said (Coke upon Littleton, 18th ed., 1823, vol. ii., 206 (*b*)) is: "But if a stranger of his own head, who hath not "any interest, etc., will tender the aforesaid money to the "feoffee" (the person who would now be the landlord)

(1) (1593) 2 Cro. Eliz. 541; 78 E. R. 788. (2) (1855) 10 Exch. 845, 847

"at the day appointed, the feoffee is not bound to receive it." On the last words Sir Edward Coke makes this note: "And "note that Littleton saith that he is not bound to receive it "at a stranger's hand. But if any stranger in the name of "the mortgagor or his heir (without his consent or privity) "tender the money, and the mortgagee accepteth it, this "is a good satisfaction."

Mr. Paull has called my attention to the words "in the name "of the mortgagor" (here the tenant), on which he relies as being part of the statement of the law, and I find a further statement in the following passage from the judgment of Parke B. in *Simpson* v. *Eggington* (1): "The general rule as "to payment or satisfaction by a third person, not himself "liable as a co-contractor . . . . appears to be, that it is "not sufficient to discharge a debtor unless it is made by "the third person, as agent, for and on account of the debtor "and with his prior authority or subsequent ratification." I cannot find the least evidence in the present case that, either as between himself and the landlord, or as between himself and the plaintiff, the defendant acted, or purported to act, or regarded himself as acting, as the agent of the plaintiff. The view which I take of this transaction is that the defendant did no more than advance out of his own pocket to an elderly, impecunious landlord, money which he did not wish her to be without for any length of time, and so he took the risk of recouping himself later on. That being so, this action must fail because it is based on the allegation that there was an illegal distress on the ground that the plaintiff had paid his rent or that somebody had paid it for him.

Judgment for defendant.

Solicitor for the plaintiff: *W. R. Perkins.*

Solicitors for the defendant: *Joynson-Hicks & Co., for Bracher, Son & Miskin, Maidstone.*

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(1) 10 Exch. 845, 847.

A. W. G.

WODEHOUSE *v.* LEVY AND OTHERS.

ST. MARYLEBONE BOROUGH COUNCIL, THIRD PARTY.

C. A.
1940
July 29, 30.

Emergency legislation—Street lighting—Metropolis—Street refuge—Duty to light—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 108, 130—*Lighting* (*Restrictions*) *Order*, 1939 (*St. R. & O.*, 1939, *No.* 1098), *paras.* 1 *and* 4.

A local authority in erecting and maintaining a street refuge in the highway under the Metropolis Management Act, 1855, s. 108, is required to keep the street well and sufficiently lighted as provided by s. 130 of that Act. But this statutory duty is abrogated during the period of the war by the Lighting (Restrictions) Order, No. 1098 of 1939, para. 1, and no other duty to illuminate the refuge rests on the local authority either at common law or by statute.

Dictum of MacKinnon L.J. in *Greenwood* v. *Central Service Co., St. Marylebone Borough Council* (*Third parties*) (1940) 56 Times L. R. 944 explained.

Great Central Ry. Co. v. *Hewlett* [1916] 2 A. C. 511, and *Baldock* v. *Westminster City Council* (1913) 88 L. J. (K. B.) 502 followed.

APPEAL from Cassels J. (1)

In this action the plaintiff Wodehouse, an infant, suing by his next friend, was injured, on the night of September 1, 1939, when travelling in a taxicab which was driven by the defendant Pirie and owned by the defendant Levy. The cab collided with an unlighted bollard on a refuge in the middle of the road near Marlborough Road Station, London, N.W. The refuge had been placed there by the St. Marylebone Borough Council under powers contained in the Metropolis Management Act, 1855, s. 108, and the street was ordinarily lighted by the council in accordance with s. 130 of that Act. But the Lighting (Restrictions) Order, No. 1098 of 1939, which came into operation on September 1, 1939, provided (para. 1) that " subject as hereinafter provided " no person should show any light during the hours of darkness and (para. 4) the general prohibition was not to apply (inter alia) to " (*d*) Lamps indicating obstructions upon . . . . the

(1) [1940] 2 K. B. 298.

"carriage way of any road provided that they are of candle "power not exceeding 1.0 and so screened as to prevent "light being thrown upwards . . . ."

In an action for damages against the owner and driver of the taxicab, in which the borough council were joined as defendants and third parties, Cassels J. held that the council were guilty of a breach of duty both statutory and at common law, in failing to light the refuge, and that this was the cause of the plaintiff's injuries. He gave judgment for the plaintiff for 275*l.* of which the council was to pay three-quarters, and the first and second defendants one-quarter. The borough council appealed from this order, both on the ground that they were not liable at all, and that, if liable, the amount of damages was wrongly apportioned against them.

Edgedale for the borough council (appellants). The decision of Cassels J., was wrong. The effect of the Lighting (Restrictions) Order, 1939, was to release the borough council from any duty to light the refuge. They were, therefore, not guilty of negligence: *Great Central Ry.* v. *Hewlett.* (1)

Montague Berryman for the respondents, Levy and Pirie. The decision of Cassels J. was right. The obligation to light the streets placed on the borough council by s. 130 of the Metropolis Management Act, 1855, was only modified, not repealed, by the Lighting (Restrictions) Order, 1939. Moreover, at common law the borough council were under an obligation to use reasonable care to prevent the refuge being a danger to persons using the highway; per MacKinnon L.J. in *Greenwood* v. *Central Service Co., Ld.* (2) Para. 4 (*d*) of the Order empowers them to light an obstruction in the highway to a modified extent, but they failed to provide that modified lighting. [He also referred to *Polkinghorn* v. *Lambeth Borough Council.* (3)] Alternatively, as the borough council chose to exercise the right to light the streets to the modified extent permitted by para. 4 of the Order, they were bound to do so without negligence, but the refuge was unlit through the negligence of some servant of the council. Upon the evidence the onus was upon the council to show that they were not negligent, and it was open to the judge at the trial to find that they were. His finding on the facts should not be reversed.

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(1) [1916] 2 A. C. 511.

(2) (1940) 56 Times L. R. 944-5.

(3) (1938) 158 L. T. 127; 54 Times L. R. 345.

Fox-Andrews for the respondent, Wodehouse.

MacKinnon L.J. This appeal is brought by the borough council. They contend that no judgment at all ought to have been entered against them, but by an alternative contention suggest that even if they were liable the distribution of the blame as to 75 per cent. on them and 25 per cent. on the taxicab owner and driver was wrong.

This case is very similar to one which was previously decided by this Court, namely, *Greenwood* v. *Central Service Co., Ld.* (1), another case of a fare in a taxicab, which had run into an unlighted bollard on a street refuge in the defendant council's area. In that case this Court decided that there was no absolute obligation upon the borough council to light the refuge, because their only obligation to light the streets existed under the Metropolis Management Act, 1855, s. 130, and that section had been temporarily repealed by the Statutory Rule and Order issued by the Home Office under emergency legislation forbidding the exhibition of any lights by anybody. Secondly, this Court held that if it was a question of using reasonable care, there was in fact in the circumstances in that case no lack of reasonable care on the part of the borough council in not lighting the refuge. They had, in fact, put a temporary lamp on it but it had gone out; and it was held that there was no negligence in not relighting it at the time when the accident happened.

In this case Cassels J. held that there was an absolute obligation upon the borough council to light this obstruction; and in the course of our judgments in *Greenwood* v. *Central Service Co.* (1) we had this case brought to our notice, and we indicated our disapproval of that part of the judgment of Cassels J. Of course, it was not open to Mr. Berryman in this case to contend in this Court that there was any absolute

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(1) 56 Times L. R. 944–5.

MacKinnon L.J.

obligation to light; but he says that we held that there was an obligation to use reasonable care to light an obstruction and that on the facts of this case the borough council did not do so.

I have observed with regret, that in the report of what I said in the *Greenwood* case (1), there do occur the words, "no "doubt, however, there would remain a common law obligation "upon the respondents, having erected an obstruction in the "highway, to use reasonable care to prevent that obstruction "from being a danger to persons using the highway." I was delivering an oral judgment, and, in the course of that judgment, no doubt I did use those words; but their reproduction in this report is one example of the disadvantages which result from too speedy activities. Even under the most perfect system of verbal inspiration a major prophet might find himself having used words which, had he had an opportunity of reflection, would have been couched in slightly different language. In that case there was in fact no negligence even if the obligation to use reasonable care did exist, and it was, therefore, unnecessary to consider with any care whether there was any such common law duty. In this case it has become more necessary directly to consider that point; and I think that my remark in the *Greenwood* case (1) was wrong. I am quite satisfied that if, as happens with what I regard as the more desirable series of law reports, I had had the opportunity of revising my judgment, I should have altered that rash passage and substituted some such words as "it is said that there was a common law obligation to use "reasonable care, but if that be so, on the facts of this case "there was in fact no negligence." As I have said, having reconsidered the point, I think the remark which I did make was wrong. It was wrong because as it seems to me the right of the borough council to erect this obstacle in the highway is given them by the Metropolis Management Act, 1855, s. 108. They are given the right to put the refuge in the middle of the highway; and, if there is any obligation to light it, that also must be discovered from some statute. In normal times of

(1) 56 Times L. R. 944–5.

peace that obligation exists under s. 130 of the same Act; but, as has been pointed out, s. 130 has now been temporarily repealed. In the absence of any provision similar to s. 130, inasmuch as the council are given by statute the right to erect the obstruction in the highway, there is no statutory and no common law duty to light it. That that is so is shown by two cases. The first is *Great Central Ry. Co.* v. *Hewlett* (1), and the second is the judgment of Bankes L.J. in *Baldock* v. *Westminster City Council.* (2)

In those circumstances we have already indicated our disapproval of the judgment of Cassels J. on the point whether there was an absolute obligation to light this bollard. After due consideration I think that, in the circumstances, there was no duty to light it either by statute or at common law. That being so, the judgment ought not to have been given against the borough council, and this appeal succeeds. I would also add that, in my view, even assuming that there was, as I meant to say in the *Greenwood* case (3), some duty to be derived under a rule of law to use reasonable care in lighting this obstruction, in the particular circumstances of this case I cannot make out that there was any lack of reasonable care on the part of the borough council. It was the very first night of the blackout, and many of their servants had been working for twenty-four hours on end. If the point had arisen I should come to the conclusion that no negligence on the part of the borough council or their employees had been established.

For all these reasons I think that this appeal succeeds and must be allowed.

LUXMOORE L.J. I agree that this appeal should succeed. As my Lord has pointed out, the questions raised in this case are very similar to those raised in *Greenwood* v. *Central Service Co.* (3) In that case, as in the case now before the Court, the main questions that arise are whether the Marylebone Borough Council is under any duty statutory or otherwise

(1) [1916] 2 A. C. 511.
(2) (1913) 88 L. J. (K. B.) 502; 120 L. T. 470.
(3) (1940) 56 Times L. R. 944.

to place a light upon an obstruction forming part of the street refuge erected under the Metropolis Management Act, 1855, s. 108, and how far any such duty is affected by the Lighting (Restrictions) Order, 1939, Statutory Rules and Orders, 1939, No. 1098. In the *Greenwood* case (1) it was held by this Court, following an earlier decision of the Court of Appeal constituted of Bankes, Warrington and Scrutton L.JJ. in *Baldock* v. *Westminster City Council* (2), that, though the council is under a duty with regard to lighting the streets under its jurisdiction by reason of the Metropolis Management Act, 1855, s. 130, it is under no statutory duty to light an obstruction erected in such a street under the provisions of s. 108, apart from its general duty under s. 130, to keep the streets within its district well and sufficiently lighted. There is no question that the Marylebone Borough Council had, long before the Lighting (Restrictions) Order, 1939, came into existence, fulfilled its duty under the Metropolis Management Act, 1855, s. 130, by providing a proper system of street lighting, and that it was maintaining that system properly, immediately before the Lighting (Restrictions) Order, 1939, came into force.

This Order came into force on September 1, 1939, and was, I understand, promulgated only a few hours before the accident occurred which gave rise to the claim in this action. It is plain that this Order absolves the borough council from any liability to keep the streets in its district well and sufficiently lighted under the Metropolis Management Act, 1855, s. 130, for it is provided by para. 1 of that Order that "subject as hereinafter provided no person shall during the "hours of darkness cause or permit any light to be displayed." It is true that the provisions of that Order fully empower certain lights to be used, but these powers are permissive only and do not affect the abrogation of the borough council's liability to keep its streets well and sufficiently lighted. We were told that there was no other statute affecting the question of lighting. That being the case, the question arises whether the borough council is under a common law obligation to light the obstruction in question. As I pointed out in the *Greenwood*

(1) 56 Times L. R. 944. (2) 88 L. J. (K. B.) 502.

case (1), the obstruction was properly erected under statutory powers conferred by the Act of 1855, s. 108, and it, therefore, cannot be held to constitute a nuisance at common law and, secondly, there cannot be any common law obligation with regard to it. In the *Greenwood* case (1) I referred to the speeches in *Great Central Ry. Co.* v. *Hewlett* (2), as affording ample authority for this view. It is true that MacKinnon L.J. said in the *Greenwood* case (1) that there was a common law obligation; but it appears to me that he had momentarily overlooked the case of *Great Central Ry. Co.* v. *Hewlett* (2), to which he had himself referred during the course of the argument. It is also worthy of note that no suggestion of common law obligation was mentioned in *Baldock* v. *Westminster City Council.* (3) In that case the council were held liable for not lighting an obstruction in a street under its jurisdiction because it had taken upon itself what Bankes L.J. and the other members of the Court described as a self-imposed duty to keep the obstruction illuminated. It is true that in *Polkinghorn* v. *Lambeth Borough Council* (4), Scott L.J. in his judgment spoke of the liability to illuminate a similar statutory obstruction as arising under the Metropolis Management Act, 1855, or the common law; and the passage which I quoted in my judgment in the *Greenwood* case which appears in the report of the *Polkinghorn* case (5) is: "In those circumstances "my view is that the legal position is a very simple one. It "is that, whether one regards the case from the point of view "of statutory duty or from the point of view of common law "negligence, in either case the failure to maintain the light is "all that is necessary for the plaintiff to prove, in order to "establish his right to damages."

In my judgment if that means that there is a common law obligation to light an obstruction of the nature referred to in this case, the decision is contrary to the decisions in *Great Central Ry. Co.* v. *Hewlett* (2) and in the *Baldock* case (3), and with the greatest respect to Scott L.J. I should feel myself unable to follow him. The decision in the *Polkinghorn* case (1) is amply justified by the fact that the Lambeth Borough Council had become subject to a self-imposed duty to illuminate the particular obstruction in the same way as the Westminster City Council had become liable in the *Baldock* case. (2)

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(1) 56 Times L. R. 944.
(2) [1916] 2 A. C. 511.
(3) 88 L. J. (K. B.) 502.
(4) (1938) 54 Times L. R. 345.
(5) 158 L. T. 127.

In the present case the borough council had never, previously to the accident, illuminated the obstruction in question, and, therefore, had not become subject to any self-imposed duty to keep it illuminated, although no doubt the council had every intention of so doing : but they failed to carry out their intention because the making of the Lighting (Restrictions) Order was not called to the attention of their officers until 4 o'clock in the afternoon of September 1, 1939. It follows from what I have said that no question of negligence arose, and I feel bound to confess that if it had been material to consider whether the borough council was guilty of any negligence, I should not have been able to agree with the finding of Cassels J. ; for I am satisfied that there was no evidence at all of its existence.

For those reasons I agree that this appeal must be allowed.

GODDARD L.J. I agree. It may be that in some of the cases expressions have been used with regard to lighting obstructions which cause confusion. Parliament having authorized the local authority to put a refuge in the street and not having imposed upon the authority the duty of putting a light on the obstruction itself, it follows that the local authority are committing no breach of statutory duty if they put a refuge in the street and do not put a light on that refuge ; but that in no way lessens the obligation of the borough council or other local authority to provide an adequate system of street lighting, and the system would not be adequate if it did not cause a reflection or light to show the position of obstructions in the streets. Thus, in peace-time, when these refuges are in the streets, while there is no obligation on the council to put a beacon or lamp actually on the refuge, they must arrange their street lighting so that there will be enough

(1) 158 L. T. 127.

(2) (1913) 88 L. J. (K. B.) 502.

light for passengers in the road to see and thus avoid the obstructions which the council have put there. They can do that by having high-power lamps on the pavement or by slinging high-power lamps across the roadway as is done on the Embankment, or they can if they wish put a light on the obstruction itself. Their obligation is only to provide an adequate system of street lighting, and when the Defence of the Realm Order came into force which prevented their lighting the streets at all, it followed that their obligation to provide street lighting was not only gone, but actually prohibited. I can find no duty on the council after that regulation came into force, under which they were bound to light the obstruction because, as my Lords have pointed out, the provision in para. 4 of the Order that the Order shall not apply to a certain class of lights is only permissive; it takes out of the prohibition, and allows certain lights to be maintained, which otherwise would be an offence, but it does not seem to me to increase the authority's obligation in any way.

I can find no obligation in this case to light a refuge apart from the general obligation to provide an adequate system of street lighting. That became illegal and it follows that the council committed no breach of their duty and the appeal should be allowed.

[Upon the question of negligence, his Lordship said that in his view even if the council had been under a duty to light, there had been no negligence on their part.]

Appeal allowed.

Solicitors for appellants: *William Charles Crocker.*

Solicitors for respondents: *A. D. Vandamm & Co.; F. J. Stewart.*

F. P. F.

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Feb. 9, 12;
June 24, 25;
July 8.

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[1938. G. No. 3892.]

False imprisonment—Detention by customs officer of ship's steward on suspicion of having harboured uncustomed goods—Action by steward against officer—No plea by defendant of actual offence by plaintiff—"Offender"—Suspected offender—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *s.* 186.

The Customs Consolidation Act, 1876, s. 186, provides: "Every person who . . . . shall knowingly harbour, keep or "conceal . . . . any prohibited, restricted or uncustomed goods" shall "for each such offence" be liable to a penalty "and the "offender may either be detained or proceeded against by "summons."

In that provision the term "offender" means an actual offender who has in fact committed the act specified, and does not include a person who is only suspected of having committed it:

Customs officers, therefore, are not entitled to detain a person, who has not committed that act, merely because they believe honestly and on reasonable grounds that he has committed it, and if they do so he may recover damages from them in an action for false imprisonment.

So *held* by the Court of Appeal (Scott and Clauson L.JJ., MacKinnon L.J. dissenting).

Trebeck v. *Croudace* [1918] 1 K. B. 158; *Isaacs* v. *Keech* [1925] 2 K. B. 354; and *Ledwith* v. *Roberts* [1937] 1 K. B. 232, considered.

APPEAL from a judgment of Sir W. F. Kyffin Taylor K.C., at the Liverpool Court of Passage.

Francis J. Gorman, hereinafter called the "plaintiff," was a ship's steward in the steamship *British Freedom.*

On July 4, 1938, at about 5.45 A.M., that ship, having completed a voyage from Rangoon, arrived at Dingle Jetty, Liverpool. At 6 A.M. the ship was boarded by one Jordan, a preventive officer of customs, who at 6.20 A.M. obtained from the master thereof a customs list signed by the master, officers and members of the crew of the ship showing what quantities of dutiable goods they had in their possession respectively as their private property. The list was signed by, among others, the plaintiff, and by one Rioch, a ship's apprentice, eighteen years of age, and did not show that either of them had any cigars in his possession.

Subsequently, one Smallwood, an assistant preventive officer of customs, in the course of his duty of rummaging the ship found in an unoccupied stateroom between the bottom boards and the mattress of the bunk therein a box of one hundred cigars which had not been declared in the list.

Following upon inquiries made by one Arthur P. Potter, a preventive officer of customs, hereinafter called "the defendant "Potter," the said Rioch stated that the cigars had been bought by the plaintiff at Rangoon, that shortly after the ship left Rangoon he, Rioch, had agreed to buy the cigars from the plaintiff for 5*s*., that at 10.30 A.M. on July 4, when the ship was alongside Dingle Jetty, the plaintiff had handed the cigars to Rioch who had concealed them where they were found. The plaintiff admitted to that officer that the cigars had been in his possession from the time the ship left Rangoon until he handed them to Rioch at the time mentioned by the latter, and he further admitted that no money had passed between him and Rioch in connection with the sale of the cigars.

On the same day, about 2.45 P.M., Mr. Stanley Barnard, chief preventive officer of customs, hereinafter called "the "defendant Barnard," told the plaintiff the amount of the fine he would have to pay if he was guilty of an offence in respect of the cigars.

Next day, July 5, in the forenoon, the defendant Barnard asked the plaintiff to pay the fine, and, on his refusing to do so, the defendants Barnard and Potter took the plaintiff to the police station at Dale Street, Liverpool, where he was charged with the offence against the Customs Consolidation Act, 1876, s. 186, of knowingly harbouring uncustomed goods, namely the said cigars, and where he remained in custody till 6.40 P.M., when he was released on bail.

On July 6 and 7, the plaintiff appeared at the police court where on the latter date the charge against him was dismissed.

On December 15, 1938, the plaintiff brought the present action against the defendants, Barnard and Potter, claiming damages for false imprisonment and malicious prosecution.

The defendants alleged that they had reasonable and probable cause for believing and believed that the plaintiff

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had committed the offence charged; but they did not plead that the plaintiff had in fact committed the offence. They put in under their defence particulars setting out in substance the facts above mentioned, and these particulars were not disputed by the plaintiff.

In June, 1939, the action was tried in the Passage Court. The plaintiff stated in evidence that Rioch agreed to buy the cigars three or four days after leaving Rangoon, and on Rioch saying he had no money, he (plaintiff) told him he could pay for them when the ship was paid off, that he put the cigars in the ship's hospital, where they remained until July 4, 1938, when the ship arrived at Liverpool, that at 10.30 A.M. on that day plaintiff told Rioch to take the cigars and to declare them and handed them to him and he took them away.

The learned trial judge did not accept the story of the plaintiff, and thought that the defendants had reasonable and probable cause for believing that the plaintiff had committed the offence with which he was charged; and he therefore gave judgment for the defendants on both claims, but in case the plaintiff desired to appeal he fixed the damages in respect of both claims at 75*l*.

The plaintiff appealed. The appeal was heard on June 24, 25, 1940.

D. N. Pritt K.C. and *M. Turner-Samuels* for the plaintiff, appellant. The plaintiff does not dispute the decision of the learned judge of the Court of Passage upon the claim for damages for malicious prosecution. The plaintiff contends, however, that the learned judge was wrong in holding that the plaintiff was not entitled to recover damages from the defendants for false imprisonment. The defendants had no right at common law to detain the plaintiff. In seeking to justify their detention of him they place reliance upon s. 186 of the Customs Consolidation Act, 1876, which provides: "Every person who . . . . shall knowlingly harbour, keep "or conceal . . . . any prohibited, restricted or uncustomed "goods shall for each such offence" be liable to a penalty; "and the offender may either be detained or proceeded against "by summons." That provision did not authorize the detention of the plaintiff by the defendants. The term "offender" as there used means an actual offender proved to have committed the offence, and does not include a person merely suspected of having committed it. That construction is borne out by the earlier words of the clause: "shall for each "such offence" be liable to a penalty. In s. 184 the term "offender" is not applied to a person who is merely suspected of having committed an offence. If the true meaning of the term be "actual offender," the defendants had no right to detain the plaintiff. At the time when they detained him they had certainly no evidence to show that he was an actual offender against the provision. Even if on its true construction the term "offender" in the section includes a person who is suspected of being an offender, the defendants had no right to detain the plaintiff. The circumstances in which they detained him did not afford them any reasonable grounds for suspecting him to be an offender. It is true that in *Trebeck* v. *Croudace* (1) it was held that under s. 12 of the Licensing Act, 1872, which gave a right to apprehend a person in charge of a carriage on a highway who is drunk, a person might be arrested on a reasonable suspicion of his being drunk, and that in *Isaacs* v. *Keech* (2) a similar construction was placed upon another Act; but it was desirable that in the Act in question in each of these cases a power to arrest on suspicion should be implied in order to prevent the purpose of the Act from being defeated. The principle of these two cases has no application to the present case, and it is not necessary to read into the statutory provision here in question, any power to arrest a person on mere suspicion. The authority of these cases would appear to have been somewhat shaken by *Ledwith* v. *Roberts*. (3)

Sir Donald Somervell A.-G., *Valentine Holmes*, and *H. P. J. Milmo*, for the defendants, respondents. The learned judge of the Court of Passage rightly held that the defendants were not liable to the plaintiff in damages for false imprisonment.

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(1) [1918] 1 K. B. 158.
(2) [1925] 2 K. B. 354.
(3) [1937] 1 K. B. 232.

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In the circumstances which existed at the time of his detention by the defendants the plaintiff was an "offender" within the meaning of s. 186 of the Customs Consolidation Act, 1876. The word "offender" is ambiguous, and one of its reasonable meanings is "suspected offender"; and a corresponding observation applies to the word "offence" which also occurs in the section. That is the meaning which must obviously be given to these words or either of them in certain other sections of this Act of 1876, as for example in ss. 55, 190, 197, 221, 224 and 229. It is said that in s. 184 these words are not used in respect of a person who is only suspected of having committed an offence; but that section only deals with the getting hold of the goods, which may possibly be in the possession of an innocent person. The wider meaning of these terms contended for on behalf of the defendants must be given to them in various other Acts. Thus in the Indictable Offences Act, 1848, s. 10, and in the Criminal Justice Act, 1925, s. 31, sub-s. 2, "offender" must mean alleged offender. The view contended for is borne out by the decided cases. In *Trebeck* v. *Croudace* (1) it was held that the power conferred by s. 12 of the Licensing Act, 1872, to apprehend a person who was drunk in certain circumstances justified an apprehension on an honest and reasonable belief that the person apprehended was drunk, though the magistrate held that he was not. That case was followed in *Isaacs* v. *Keech* (2), though possibly with some reluctance on the part of Scrutton L.J. The authority of these decisions has not been diminished by *Ledwith* v. *Roberts*. (3) If there were grounds for implying a power to arrest on suspicion in the Act which was in question in *Trebeck* v. *Croudace* (1), there are at least as strong grounds for implying such a power in s. 186 of the Act of 1876, which is in question in the present case. The canon of construction adopted in that case should be applied here as a matter of public policy, the power of detention conferred by s. 186 being of a distinctly preventive character. In *Isaacs* v. *Keech* (2) and *Ledwith* v. *Roberts* (3) there was no greater urgency or other stronger reason for implying a power to arrest on suspicion than existed in the present case. The revenue should be protected against the risk of the disappearance of a person suspected on reasonable grounds of defrauding it.

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(1) [1918] 1 K. B. 158.
(2) [1925] 2 K. B. 354.
(3) [1937] 1 K. B. 232.

D. N. Pritt K.C. replied.

1940. July 8. The following judgments were read:

SCOTT L.J. This is an appeal from a judgment of Sir Francis Taylor as presiding judge of the Court of Passage of the City of Liverpool, dated June 17, 1939, in favour of the defendants, the present respondents.

The action was brought by the plaintiff claiming damages for malicious prosecution and false imprisonment, and the learned judge, although deciding in favour of the defendants on both issues, provisionally fixed the damages for the two causes of action at 75*l*. It was neither pleaded nor contended that the plaintiff had in fact committed the offence.

On the appeal before us Mr. Pritt on behalf of the appellant was content to accept the decision of the court below upon the claim for damages for malicious prosecution. At the conclusion of the appeal Mr. Pritt and the Attorney-General both agreed that this Court should deal with the quantum of damages as we thought fit, if we allowed the appeal on the issue of false imprisonment. In the circumstances of the case we think 25*l*. out of the 75*l*. may properly be treated as having been allocated by the learned judge to the issue of false imprisonment.

The appellant, to whom I will refer as the plaintiff, was a ship's steward on board the steamship *British Freedom*, which arrived in Liverpool on July 4, 1938, from Burma. The two defendants were preventive customs officers. On July 5 they detained the plaintiff, took him to the police court and there charged him with knowingly harbouring uncustomed goods consisting of a box of cigars with intent to defraud His Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876. He was detained in custody for some hours, but released on bail at 6.40 P.M. He came before the Liverpool Stipendiary Magistrate on July 7 and the charge was there dismissed. By writ issued on December 15, 1938, the plaintiff claimed damages for malicious prosecution and false imprisonment. The defence was that the two defendants had formed the opinion on reasonable and probable grounds that he had committed the offence and the defendants submitted that that bona fide belief afforded them a defence in law to the action of false imprisonment. Particulars were given of that defence and the facts stated in the particulars were treated by counsel for the plaintiff at the trial as common ground. The learned judge held that those facts did constitute a reasonable and probable cause, and upon that view dismissed not only the claim for damages for malicious prosecution, but also the claim for damages for false imprisonment. No witness was called on either side except the plaintiff.

The facts as pleaded, or proved by the plaintiff in the witness box, were these: He had bought the cigars in Rangoon and kept them lying on a spare bunk in the cabin where he slept till between 10 and 11 o'clock on the morning of July 4, 1938, the ship having arrived alongside the quay at 4 A.M. At 6 A.M. customs officers boarded the ship, and at 6.20 A.M. the usual customs list, No. 142, was signed by the plaintiff and one Rioch, an apprentice eighteen years old. The document was headed "Notice to Masters and Officers and Crews of "vessels regarding goods brought as their private property "from abroad," and para. 1 states: "This form must be "completed in readiness to be handed to the officer of customs "and excise who first visits the vessel. It must be signed by "each member of the crew (including the master and officers) "who must state opposite his signature the quantity of dutiable "goods in his possession. If he has nothing he must state "'nil' or 'nothing'"; and para. 3: "Any dutiable, "prohibited or restricted articles the property of any member "of the crew, found in the vessel and not declared will be "liable to forfeiture and the owner thereof will be liable to "prosecution." The columns for the signature, rank and particulars of goods are headed thus: "To the principal officer "of the customs and excise, Liverpool. We, the undersigned "master, officers and members of the crew of the *British* "*Freedom* from..................declare that we have in our "possession, respectively, as our private property the quantities, "and no more, which we have respectively placed opposite "our signatures and we severally undertake that none of the "goods shall be landed without authority of the proper officer "of customs and excise."

The defendant customs officers when "rummaging" in the ship found the box of cigars hidden under a mattress and above the boards of a bunk in an unoccupied state-room. The apprentice, Rioch, told the defendant Potter that the cigars had been bought at Rangoon by the plaintiff, but that he had agreed to buy them from the plaintiff for 5*s*. and that about 10.30 on July 4 the plaintiff had handed them to him and that he had concealed them where they were found by the customs officer. The plaintiff admitted to the defendant Potter that the cigars had been in his possession until that time, and stated that he had agreed to sell the box to Rioch for 5*s*., the money to be paid when the ship was paid off. Neither the plaintiff nor Rioch had declared the cigars, either in customs list 142 or by word of mouth; but each had signed the list after entering "nil" in the column for cigars. The signatures to the form followed the printed declaration saying: "We the undersigned members of the "crew . . . . . declare that we have in our possession "respectively as our property the goods described opposite "the signatures." As the learned judge said in his judgment, if the story of the sale to Rioch was true, the plaintiff had no duty to declare them, as they were not his property, and Rioch had no such duty, as they were not in his possession. In the witness box before the learned judge the plaintiff said that when he handed the box to Rioch at 10.30 or 11 o'clock on July 4, he said to Rioch: "Whatever you do, declare "them." He did not, however, tell the customs officers that he had given that warning to Rioch. The learned judge said of the plaintiff: "I had the plaintiff under observation in the "witness-box for a considerable time and he made a most "unfavourable impression. As a judge of fact, I could not "accept his account. I remember that he had been acquitted "and I am bound to regard him as innocent of the offence. "I think, however, the defendants had reasonable grounds "for not accepting his story of the sale and it is permissible "to infer from their act in arresting him that they did not "accept it. The plaintiff did not tell the defendants that "he said to Rioch: 'Whatever you do, declare them,' and "this was said after the declaration had been signed by Rioch. "If the story was not accepted, the defendants had reasonable "grounds for believing that the cigars were his property and "in his possession when he signed the declaration, and therefore "reasonable grounds for believing he had committed the "offence. If a jury had tried the case, they must have been "influenced, as I was, by his demeanour in the witness box." If the learned judge was dissatisfied with the plaintiff as a witness and did not trust his evidence, the customs officers may well have received a similar impression, and I am not prepared to differ on the facts in evidence from the learned judge's conclusion that the customs officers had reasonable or probable ground for disbelieving the plaintiff's story. The concealment of the cigars under the mattress was obviously deliberate, and the customs officers may well have had regard to the fact that Gorman, the older man, had kept the cigars in his possession till the last minute, and concluded that he thought it safer for his own purpose to entrust them to the apprentice. The learned judge definitely thought they were justified in disbelieving the story of the sale and, having regard to the plaintiff's demeanour, I think that this Court ought to accept the learned judge's finding of fact.

In the Court below the case seems to have been argued for the plaintiff on the hypothesis that suspicion on reasonable grounds would justify the detention of the plaintiff. There is no trace in the learned judge's judgment of any discussion having taken place at all on the meaning of the word "offender" in s. 186, which is the critical question in the case. At common law not even a constable or other police officer—and a fortiori not a customs officer—would have had any right to arrest the plaintiff, even if it be assumed that the things with which he was charged would constitute a misdemeanour. Consequently it was essential for the defence to be able to point to a definite statutory provision authorizing the arrest in question. The section relied on by the respondents before us was the section under which the charge was made in the police court, i.e., s. 186 of the Customs Consolidation Act, 1876. That is a long section and it is not necessary to quote the whole. The relevant parts of it are these: "Every person "who shall import or bring, or be concerned in importing or "bringing into the United Kingdom any prohibited goods or "any goods the importation of which is restricted, contrary "to such prohibition or restriction, whether the same be "unshipped or not, ... or shall knowingly harbour, keep, "or conceal, or knowingly permit or suffer, or cause or procure "to be harboured, kept, or concealed, any prohibited, restricted "or uncustomed goods, ... or shall be in any way knowingly "concerned in carrying, removing, depositing, concealing, or "in any manner dealing with any such goods with intent to "defraud Her Majesty of any duties due thereon, or to evade "any prohibition or restriction of or applicable to such goods, "or shall be in any way knowingly concerned in any fraudulent "evasion or attempt at evasion of any duties of Customs, "or of the laws and restrictions of the Customs relating to "the importation, unshipping, landing and delivery of goods, "or otherwise contrary to the Customs Acts, shall for each "such offence forfeit either treble the value of the goods, "including the duty payable thereon, or one hundred pounds, "at the election of the Commissioners of Customs, and the "offender may either be detained or proceeded against by "summons."

Mr. Pritt, for the appellant, did not dispute that there was evidence of somebody knowingly harbouring or concealing the cigars with intent to defraud His Majesty of duties; but he submitted that the final words of the section " and the "offender may either be detained or proceeded against by "summons" did not authorize the detention of a person suspected of offending, but not in fact guilty of the offence. In aid of his construction he pointed to the preceding sentence

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which provided "that for each such offence" the person in question should forfeit treble the value of the goods, including the duty payable thereon, or 100*l.*, at the election of the Commissioners of Customs. It was obvious, he submitted, that the fine could not be imposed except for offences actually committed, and the word "offender" must be construed on a comparable footing as limited to an actual offender, and not to a person erroneously suspected of offending. In my view, this argument is well founded, and I should have been content to limit my judgment to that ground. The learned Attorney-General, however, contended that the word "offender" must be construed to include not only an alleged offender, but also a suspected offender as well as an actual offender or a convicted offender; and to establish this interpretation he relied on various other sections of the same Act and two decisions, one of the Court of Appeal and the other of a Divisional Court, for the purpose of showing that the word both could be and in the context of the Customs Consolidation Act ought to be construed so as to include such wider meaning. I have given careful consideration to his argument and to each of the sections to which he referred us; but I am not convinced. It is, however, right that I should state the affirmative reasons which have satisfied me that his construction should not be put upon s. 186.

The first is the natural English meaning of the word "offender" in its context in the section. In my opinion, Mr. Pritt's contention on that is sound. I put the reasoning thus: Just as the goods may be forfeited and a 100*l.* fine inflicted for "the offence" of harbouring, so the person, who has exposed himself to that fine by committing the offence, may be detained. Unless the word "offender" can be construed as covering a suspected offender, the question of reasonable and probable ground for the suspicion does not arise. In my opinion, the natural meaning of the word by itself is "a person who has committed an offence." If the customs officer suspects, but does not feel sure, the section tells him what to do—to proceed against the person he suspects and charge him with the offence on a summons in the police court. No doubt the noun " offender " when followed by the words " may be proceeded against by summons " must be construed as meaning the person to be charged with the offence in the summons ; but that is no reason for supposing that the Legislature intended that meaning where it gave power to detain on suspicion. That " offender " in that context means " a person who has committed the offence," is borne out by s. 199, which provides that " if any person "liable to be detained under the Customs Acts shall not be "detained at the time of committing the offence, or being "detained shall escape, he may afterwards be detained at "any place within the United Kingdom within three years "from the time when the offence was committed." This seems to me conclusive that in s. 186 " the offender " does mean " the person who has in fact committed the offence." If there be still (contrary to my view) any doubt as to the meaning of the word " offender " in s. 186, in relation to the power of detention, the fact that a few sections later in the same group of sections relating to the " Prevention of "Smuggling " (ss. 169 to 217) powers of acting upon " reasonable suspicion " are conferred in express terms (ss. 203 and 205), is sufficient to forbid any straining of the natural meaning of the word in s. 186 ; and those two sections follow immediately on s. 202 which refers to " all persons liable to "be detained for any offence " and confers power on a variety of persons to seize or detain them anywhere on land or water. It cannot surely be supposed that the Legislature intended such a power to be exercised except in strict compliance with the powers of arrest under the particular provisions of the Act which made them persons originally liable to arrest. Lastly, s. 267 contains two provisions which show beyond doubt that the powers conferred by earlier sections authorizing the seizure of smuggled goods must have been limited to cases where a smuggling offence had actually been committed, and could not have extended to cases of unfounded suspicion, however " reasonably or probably " grounded ; for instance, the offences enumerated in s. 186 for which liability to forfeiture and fine is there imposed. The first provision enables a judge

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in an unsuccessful proceeding by the Crown to enforce a forfeiture to give a certificate that the seizing officer had reasonable or probable cause for his seizure and enacts that the certificate shall serve as an absolute protection to the seizor from proceedings against him. The second provision protects the seizor in any action against him for wrongful seizure from any but nominal damages if the judge holds that there was reasonable or probable cause for the seizure. The section invites one further comment. It gives no similar protection to the defendant officer in an action for false imprisonment; that cause of action is left unaffected, being only limited on usual lines of public authorities' protection by ss. 268 to 272; they were repealed by the Public Authorities' Protection Act, 1893, which then took their place.

If, in spite of the corroboration of the natural construction of s. 186 afforded by other sections of the same Act, it still be thought that there is any doubt left about the meaning of s. 186, the long list of statutes authorizing arrest cited in Halsbury, 2nd ed., vol. ix., pages 89 to 94, deserves attention. They might be divided up into various categories, but for present purposes I divide them into two main categories: (1.) those which confer a power of arrest where the offence is in fact committed, in most of these statutes the offence being one which is actually witnessed by the person authorized to arrest or is otherwise patent; (2.) those where the power is expressly given on reasonable suspicion—for example, Naval Deserters Act, 1847, s. 9; Larceny Act, 1861, s. 103; Pawnbrokers' Act, 1872, s. 34; Explosives Act, 1875, s. 78; Army Act, s. 154. I limit my instances to statutes enacted before 1876. There has been held by the Court of Appeal to be a third type, which is in its nature an exception from the first category. The decision in question is *Trebeck* v. *Croudace* (1), where a driver of a motor-car in a public thoroughfare was arrested under s. 12 of the Licensing Act, 1872, which contains a power to apprehend a person in charge of a carriage on a highway who is drunk, but contains no

(1) [1918] 1 K. B. 158.

express extension of the power of arrest to cases of reasonable suspicion. There this Court implied that power from the nature and object of the enactment, namely, that it contemplated an immediate need of arrest to prevent injury to the public. That principle was enforced in *Isaacs* v. *Keech* (1), where a Divisional Court consisting of two Lords Justices felt bound by *Trebeck* v. *Croudace* (2), to apply that decision to a case of soliciting by a street prostitute. Those cases were discussed by the present Master of the Rolls in *Ledwith* v. *Roberts* (3), and I expressed my entire agreement (4) with what he had there said. Whether I should have decided *Trebeck* v. *Croudace* (2) in the same way is not a matter which I can discuss, but I am bound to say that it is not easy to reconcile it with *Bowditch* v. *Balchin* (5), which lays down a fundamental principle of the liberty of the subject. In my opinion, that principle has no application whatever to the enforcement on behalf of the Commissioners of Customs of a customs fine, and consequently the decision in *Trebeck* v. *Croudace* (2) does not bind us in the present case.

For the above reasons, I think the appeal should be allowed, the judgment below discharged, and judgment entered for 25*l.* damages for false imprisonment, with costs here and below.

MacKinnon L.J., whose judgment was read by Clauson L.J.: This is an appeal from a judgment of the very learned judge of the Court of Passage at Liverpool. The plaintiff was a ship's steward. The defendants were preventive officers of the customs. On the morning of July 5, 1938, the defendants detained the plaintiff pursuant to the powers given them by s. 186 of the Customs Consolidation Act, 1876, on a charge of harbouring a box of cigars, and took him to a police station. In the afternoon he was released on bail. On July 6 the charge was heard by the Stipendiary Magistrate. At the conclusion of the evidence the Stipendiary Magistrate said:

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(1) [1925] 2 K. B. 354.
(2) [1918] 1 K. B. 158.
(3) [1937] 1 K. B. 232, 256, 258.
(4) [1937] 1 K. B. 232, 269.
(5) (1850) 5 Ex. 378.

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"I think there is a real doubt in this case which the prisoner ought to get the benefit of." He was therefore discharged.

On December 15, 1938, the plaintiff issued a writ in the Court of Passage against the defendants, claiming damages for (1.) wrongful arrest, and (2.) malicious prosecution. The learned judge dismissed both claims. The plaintiff appeals. As to the claim for malicious prosecution, we are all, I think, agreed that the judge was right in holding that the plaintiff had failed to establish the absence of reasonable and probable cause for the prosecution on the part of the defendants, and his appeal on that claim fails. The judge remarks that, having heard the story again, and observed the demeanour of the plaintiff "as a judge of fact I could not accept his "account. I remember that he has been acquitted and I "am bound to regard him as innocent of the offence. I think "however the defendants had reasonable grounds for not "accepting his story."

The plaintiff having been arrested and detained for some hours by the defendants, it was for them to justify that. They relied on s. 186 of the Act of 1876. And the question involved in this appeal concerns the construction of a few words in that section. The earlier part of it defines certain offences, and the section ends "and the offender may either "be detained or proceeded against by summons."

It is argued for the plaintiff that the word "offender" must mean "one who is in fact guilty of the offence." So that however strong and reasonable may be the grounds for suspecting a man, if he is lucky enough to get the benefit of a doubt when tried, and be discharged, the officers who detained him are ipso facto liable to a claim for damages for wrongful arrest.

I confess I do not see why the simple word "offender" must mean "one who is in fact guilty of the offence." I think it may equally mean "one who on reasonable grounds "is suspected of the offence." The word "culprit" is at least as suggestive of guilt as the word "offender." The clerk of assize for centuries said: "Culprit, how wilt thou be "tried." But he did not by "culprit" mean "You who are "in fact guilty." For on the "culprit" saying in the time honoured ritual "By God and my Country" the clerk rejoined "God send thee a good deliverance."

I think the word "offender," having regard to the nature of this Act and this section, can properly be taken to mean "a suspected offender," and must not be limited to mean "one who has in fact committed an offence." If that be so, the defendants must of course establish that they had reasonable grounds for their suspicion. The judge has found that they had, and there was overwhelming evidence on which he could so find. It is, indeed, obvious that he shared their suspicions to the full, though "he has to remember "that he was acquitted, and so he is bound to regard him as "innocent of the offence."

That "offender" may mean "one who is suspected of "the offence" as well as "one who has committed the "offence" is, I think, shown by the use of the word in other parts of this Act. I refer to ss. 197, 221, 224, 229 and 233. Similarly in s. 10 of 11 & 12 Vict., c. 42 (1), powers are given as to "the offender," while by s. 1 of the same Act the offender clearly means "any person guilty or suspected "to be guilty of having committed any such crime or "offence."

Two cases were cited which, though dealing with different pieces of legislation, seem to me to be of assistance. In *Trebeck* v. *Croudace* (2) there was a claim for false imprisonment. The plaintiff had been arrested under an Act which provided that "Every person who is drunk may be apprehended." The plaintiff was acquitted of being drunk, and so brought his action. The jury found that the defendant, who had arrested him, honestly believed that the plaintiff was drunk. On this judgment was entered for the defendant. The adjective "drunk" seems to me to be less capable of ambiguity than the substantive "offender." Yet it was held that the plaintiff failed. "The question," says Bankes L.J. (3), "is "whether a constable who arrests a person . . . . must prove

(1) Indictable Offences Act, 1847.

(2) [1915] 1 K. B. 158.

(3) Ibid. 167.

"in order to justify his action that the person arrested was "actually guilty of the offence, or whether it is sufficient to "show . . . . that he acted without malice and with reasonable "and probable cause." And the Court held that the latter alone was the burden upon him.

A similar decision, on another statute, was arrived at in this Court, in *Isaacs* v. *Keech*. (1) Bankes L.J. in the course of his judgment says (2) : " I think, however, that the whole "trend of authority has been to put a uniform construction "upon enactments giving power to arrest . . . . a person "found committing an offence, and to hold that what the "Legislature has in mind is not a mere power to arrest the "person ultimately found guilty of the offence, but is a power "to be exercised by the proper authority of acting at once "on an honest and reasonable belief that the person is "committing the particular offence." If that be correct, as I think it is, it appears to be not merely material but conclusive in the present case.

It was suggested in argument that the authority of those two cases had been shaken or diminished by the later decision in this Court of *Ledwith* v. *Roberts*. (3) The actual decision in that case was that the persons arrested did not come within the description of persons whose arrest was authorized by the statute involved. That was sufficient to decide the case, and any criticism of *Trebeck* v. *Croudace* (4) or *Isaacs* v. *Keech* (1) was irrelevant. Despite the postponement of this judgment I have not managed to find time to read in any detail the inordinately lengthy judgments in *Ledwith* v. *Roberts*. (3) I gather that the validity of the two earlier judgments was to some extent questioned or doubted. But as all three cases were decided in this Court I suppose I am not constrained to agree with one view rather than the other. For my part I think *Trebeck* v. *Croudace* (4) and *Isaacs* v. *Keech* (1) were rightly decided, and I think the passage from the judgment of Bankes L.J. which I have quoted was as sound in law as it is obviously grounded on common sense.

(1) [1925] 2 K. B. 354.
(2) Ibid. 360.
(3) [1937] 1 K. B. 232.
(4) [1918] 1 K. B. 158.

In the result, differing unhappily from my brethren, I think this appeal should be dismissed.

CLAUSON L.J. This is the plaintiff's appeal from the presiding judge of the Court of Passage, who gave judgment for the defendants in an action by the plaintiff claiming damages from the defendants, who are officers of the Commissioners of Customs, for false imprisonment and malicious prosecution. The claim in regard to malicious prosecution failed and I need not refer to it further. In answer to the claim for false imprisonment the defendants relied upon the power of detention conferred on them by s. 186 of the Customs Consolidation Act, 1876, in regard to a person offending against that section. It was not pleaded that the plaintiff had committed an offence under the section and it was accordingly not contended that he had done so, either before the learned presiding judge or in this Court, but it was said that the defendants had reasonable and probable cause for believing and did believe that the plaintiff had committed an offence under the section. The facts are fully stated in the judgment of the presiding judge and I do not propose to repeat them. Counsel for the plaintiff failed to convince me that the finding of fact by the learned judge that the defendants had reasonable and probable cause for believing and did believe that the plaintiff had committed an offence under the section was otherwise than accurate. The question, however, remains whether that finding justifies the detention by the defendants of the plaintiff in respect of an alleged offence against the section which he must be taken never in fact to have committed.

Accordingly the sole question left in this case is whether, on the true construction of the section, the words "the "offender" can be construed to cover a person of whom it cannot be predicated that he has committed an offence under the section; or, in other words, whether there is any ground for construing the words as including "a person whom the "detaining party believes on reasonable and probable grounds "to have committed an offence under the section." As a matter of English language I find it impossible to give the suggested larger meaning to the words. If we give them the larger meaning we are, in my judgment, going beyond the natural construction of the statute; and in a case in which the liberty of the subject is concerned we are not free so to do, as was pointed out by Pollock C.B. in *Bowditch* v. *Balchin.* (1)

It was, however, strenuously contended before us by the Attorney-General on behalf of the defendants that we ought nevertheless to give the crucial words an extended meaning by reason of the decision of this Court in *Trebeck* v. *Croudace* (2), and the argument was fortified by a reference to *Isaacs* v. *Keech* (3), where a Divisional Court, referring to *Trebeck* v. *Croudace* (2), construed a power given to a constable by the Town Police Clauses Act, 1847, s. 28, to take into custody a person who within his view committed an offence under that Act as a power to take into custody a person whom the constable honestly and on reasonable grounds believes to be committing the offence. These cases have been recently considered in this Court in *Ledwith* v. *Roberts.* (4) The judgment of the present Master of the Rolls, and in particular certain passages appearing in the course of it (5), make it superfluous for me to analyse those cases once again. I am prepared to accept *Trebeck* v. *Croudace* (2) as authority for the following proposition which may well be (and indeed must I think in this Court be taken to be) the law, namely, that the natural construction of a section conferring a power of arrest upon an executive officer in case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable grounds that the offence has been committed, if the character of the offence is such that in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for. If that be a correct view of the canon of construction to be applied, it seems clear that reliance cannot be placed on any

(1) 5 Ex. 378, 381.
(2) [1918] 1 K. B. 158.
(3) [1925] 2 K. B. 354.
(4) [1937] 1 K. B. 232.
(5) Ibid. 256, 258.

principle to be derived from the decision in *Trebeck* v. *Croudace* (1) where, as in the present case, the power is given merely for the purpose of facilitating the recovery from the alleged offender of certain penalties; and, as I read the section, that is the purpose and sole purpose of the power of detention given by the section under consideration. It is perhaps not without interest to note that the Act contemplates that the power of detention conferred by the section, while no doubt it is exerciseable promptly immediately upon the commission of the offence, may, in default of earlier exercise, be exercised at any time within three years.

For these reasons, I am of opinion that the defence of honest belief with reasonable and probable cause that the alleged offence had been committed does not avail to the defendants, and that accordingly there should be judgment for the plaintiff for damages for false imprisonment. By consent of counsel the sum to be awarded was left to this Court, and I concur in the assessment of the damages at 25*l*.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for appellant: *Silverman & Livermore.*
Solicitor for respondents: *Solicitor of Customs and Excise.*

(1) [1918] 1 K. B. 158.

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HARRY PARKER, LIMITED *v.* MASON.

[1938. H. 3956.]

Contract—Illegal contract—Principal and agent—Money paid to be applied for illegal purposes—Money not applied—Date for application past—Claim to recover the money—Claim dismissed.

The defendant employed the plaintiffs, who were turf commission agents to place a bet of 6000*l.* each way on his horse at a race at Nottingham. He was induced to employ them on representations that they could place 6000*l.* with street bookmakers and the remaining 6000*l.* with bookmakers all over the country in such a way that the starting price of the horse would be little affected. The horse was unplaced in the race and the defendant who had already paid the plaintiffs 6000*l.* for use in connection with the street betting paid the balance due to them of 5875*l.*, being the remaining 6000*l.* less a small sum owing by them to the defendant. The defendant subsequently discovered that the money had not been applied as instructed but had been retained by the plaintiffs in the belief that the horse would lose. In a counterclaim against the plaintiffs in an action brought by them (which failed) to recover money owing in respect of subsequent betting transactions, the defendant claimed to recover the sum of 11,875*l.* as damages for fraudulent misrepresentation and, alternatively, as money received by the plaintiffs to his use. The facts were in dispute between the parties but the above facts were found and also that the parties conspired for the defendant to make a sham bet on another horse on the course to deceive the public.

Held, (1.) that the bargain proved and relied on by the defendant involved two illegalities—(*a*) that bets should be made to the extent of 6000*l.* with street bookmakers and (*b*) that the parties conspired to make a sham bet on the course; (2) that the Court would not in these circumstances assist the defendant to recover the money paid by him to the plaintiffs for an illegal purpose. Although a locus pœnitentiæ was allowed to a guilty party who repented and withdrew from the illegal contract before the time for its performance, there had been no such repentance here and it was too late to seek to withdraw from the contract after the time for its performance had passed. Further, the existence of the relationship of principal and agent between the parties did not afford an exception to the general rule that the Court would not assist a party to an illegal contract.

Decision of Stable J. affirmed.

The principle laid down by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 343 applied.

APPEAL from Stable J.

The plaintiffs in the action were Harry Parker, Ld. (hereafter called the plaintiff company) and Abraham Stein (commonly known as Harry Parker and hereafter called the plaintiff). He and his brother were the only shareholders of the plaintiff company which had been incorporated to carry on the business of bookmakers or turf commission agents. The defendant was Bernard William Mason, who, after making a considerable fortune in the City of London, engaged in betting, first in greyhound, and afterwards, in horse racing. In connection with the horse racing he bought and backed horses of his own. The defendant was running one of his horses called "Another Greek" in a race at Nottingham and was minded to back it heavily. According to the defendant's story, the plaintiff asked him to employ him or the plaintiff company to act as his agent in making bets. The plaintiff said that if the bet on "Another Greek" was entrusted to the company he could place the bet so that it did not affect the starting price of the horse greatly and the defendant agreed to back the horse for 6000*l.* each way on the understanding that the plaintiff had an organization of youths on bicycles through whom he could place 6000*l.* with street bookmakers and that he could place the remaining 6000*l.* with bookmakers all over the country, so that none of the street betting and little of the other betting would reach the course in time to affect the starting price of the horse. The defendant said that induced by their representations he paid the plaintiff 6000*l.* in cash to be used for the street betting. The race was run on October 4, 1937, but "Another Greek" was unplaced and the defendant paid the plaintiff a further sum of 5875*l.* being the balance from the 12,000*l.* less a small sum due to him in respect of another transaction. Later the defendant backed two other horses of his with the plaintiff company and lost a further total sum of 8100*l.* The defendant declined to pay this on the ground that he was not satisfied that the horses had not been interfered with and at the end of 1938 the defendant arranged an interview with the plaintiff and installed an electrical recording apparatus to get an irrefutable account of the meeting. At the meeting the defendant said he wished to be satisfied that the money was laid as arranged but the plaintiff did nothing to satisfy him and the defendant persisted in his refusal to pay. In the course of the conversation the defendant said : " You know you told me at Warwick last "year when there were only eight runners . . . . We ought "to have run. I've got seven of the jockeys squared." To this the plaintiff replied : " I said I could get you a bit of "help. The jockeys would have a bit of money on you each "way. I could get three or four jockeys in a race who could "have a pony each way."

In December, 1938, the plaintiff company and the plaintiff (hereafter collectively referred to as the plaintiffs) brought this action claiming the sum of 8100*l.* as being due on an account stated. The defendant denied this and counterclaimed to recover 11,875*l.* on the ground that the plaintiffs in lieu of placing the money as arranged had in breach of his instructions and by way of fraud retained the money in their hands. He also alleged that shortly before October 13, 1937, the plaintiff on his own behalf and on behalf of the plaintiff company had orally reported that the company had made the bets as arranged and that on this understanding he paid the sum of 5875*l.* being the balance of the sum of 11,875*l.* He alleged that these representations were made falsely and fraudulently with the intention that they should be acted on by him and he claimed repayment of the sum of 11,875*l.* as damages for fraudulent misrepresentation or alternatively, as money held by the plaintiffs for his use. The defendant also alleged that the plaintiff suggested that he should make what was called a " phoney " bet on another horse at Nottingham, the idea being that persons at the course would draw the inference that the defendant did not expect some other horse to win. The idea was that the bet was to be a sham one. The plaintiffs denied the defendant's allegations and said that the bet of 12,000*l.* was a straight bet between the defendant and the company and the plaintiff also said that he had undertaken with the defendant not to lay off any of the bet in such a way as seriously to affect the starting price.

When the action came on for trial before the Lord Chief Justice and a common jury, the plaintiffs admitted that they could not succeed on the action to recover 8100*l.* and submitted to have it dismissed with costs; on the counter-claim the Lord Chief Justice after hearing the defendant's evidence withdrew the case from the jury and dismissed the counter-claim on the ground that there was no evidence of such an arrangement as the defendant alleged. A new trial of the counter-claim was ordered by the Court of Appeal, the counter-claim came up for hearing before Stable J. without a jury.

On the issues of fact Stable J. found that the defendant made the bet of 12,000*l.* through the plaintiffs as the result of the plaintiff's representations that he had an organization which enabled him to spread bets all over the country with a very large number of bookmakers and that he had another remarkable organization which enabled him, by bribing the jockeys, to insure that the horse being backed should win; and he held that in point of fact neither the plaintiff nor the plaintiff company had taken any steps to lay the money for the defendant but had retained it in their hands in the belief that the horse would lose the race. He also held that the sham bet was made. He adjourned the case for argument on the law.

After hearing argument on the law, Stable J. gave his judgment on May 9, 1940, in which he said that as the contract between the plaintiffs and the defendant was illegal neither side could recover on the contract.

For the defendant it was contended that here the illegal purpose had not been fulfilled and that the defendant as the principal could before it was fulfilled countermand the mandate and direct the plaintiffs as his agents to pay back the money in their hands. It was true that the law allowed a locus pœnitentiæ in such a case but that doctrine could not apply here because the mandate was to have been carried out on or before October 4, 1937, and the defendant had not by then countermanded the mandate or repented his bargain. It was too late to do so after the race was run and his horse had lost.

It was also contended that when a principal handed money to an agent with a mandate to apply that money in a particular

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way which the agent had not performed, but had in fraud of his principal put the money in his pocket, the principal could recover the money from his agent without setting up the illegal transaction. It might well be that if two principals were engaged in an illegal transaction of sale and the agent of the seller received the purchase money from the buyer, then the agent could not set up the illegal transaction when called upon to pay over the money to his own principal. But that law had no application to a case when a principal paid money to his agent with a direction to the agent to expend the money on some illegal purpose.

Further to maintain an action for money had and received the defendant had to prove the exact circumstances in which the money was paid and the circumstances which he said entitled him on grounds of justice to repayment of the money. But as soon as the defendant proved the circumstances in which the 12,000*l.* was paid, it was clear that the claim must fail.

The defendant appealed. The appeal was heard on July 16, 17, 18, 19 and 22, and judgment given on August 1, 1940.

A large part of the argument was directed to the question of fact, the defendant contending that he had not been a party to any fraudulent or illegal transaction. The arguments are only set out on the question of law involved on the footing that the plaintiffs and the defendant were parties to an illegal transaction.

A. T. Miller K.C., *P. B. Morle* and *E. Ould* for the appellant. On the assumption that the argument on the facts fails and that the defendant was engaged with the plaintiffs in a fraudulent conspiracy, the defendant is still entitled to recover as principal from his agents the money which remained in their hands and was never applied for the fraudulent purpose. Broom's Legal Maxims, 9th ed., p. 469, lay it down that the obligation of an agent who has received money to the use of his principal to pay it back rests upon the agent's implied contract to return the money if called upon to do so: see in support of this *Taylor* v. *Lendey* (1) and *Bone* v. *Ekless.* (2)

(1) (1807) 9 East. 49, 51.

(2) (1860) 5 H. & N. 925.

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[Luxmoore L.J. referred to *Hastelow* v. *Jackson.* (1)] It was there expressly decided that money given for use in any illegal contract could be recovered at any time before that contract was executed. The right of recovery is in no way founded on the illegal contract. There is no distinction between goods and money, either of them can be recovered. The only ground on which the agent can refuse repayment is that he has dealt with the money as instructed so that it is no longer in his hands. That principle applies directly here. It is no part of the defendant's case against the plaintiffs to plead the misrepresentation or fraud. All he need say is: " I gave you money to apply on my account and you have "not done so, so hand me the money back." The only persons who have to set up the illegal contract are the plaintiffs and as it is an illegal contract, it is not open to them as a defence to the defendant's claim. *Berg* v. *Sadler & Moore* (2) is not an agency case and it is distinguishable from the present case. A seller was paid purchaser's money whom it was intended to defraud. He discovered this and never completed and the vendor could not recover the money he had paid him.

[MacKinnon L.J. Would not the Court refuse to help the claimant to recover his money on learning that it is given for some illegal purpose such as a bribe? In this case the defendant has told all the facts and revealed the illegal purposes.]

It is true that ex turpi causa non oritur actio is a well settled principle: see *Parkinson* v. *College of Ambulance, Ld., and Harrison.* (3) The whole point here is that the defendant can recover his money independently of the illegal contract for which the money was intended to be applied.

Gilbert Beyfus K.C. and *C. Gallop* for the respondents. Where a plaintiff is a party to an illegal transaction the Court will not help him, even though the defendant is enabled thereby to retain money he has no right to.

There can be no difference in principle between where the parties are principal and agent and separate principals. An

(1) (1828) 8 B. & Cr. 221.
(2) [1937] 2 K. B. 158.
(3) [1925] 2 K. B. 1.

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action, based on an illegal contract, cannot be maintained: *Scott* v. *Brown, Doering, McNab & Co. Slaughter & May* v. *Brown, Doering, McNab & Co.*(1) One exception is to be found in a dictum of Mellish L.J. in *Taylor* v. *Bowers* (2) where he said: "If money is paid or goods delivered for an illegal "purpose, the person who had so paid the money or delivered "the goods may recover them back before the illegal purpose "is carried out." That dictum is referred to by Fry L.J. in *Kearley* v. *Thomson* (3), where it was held that the partial performance of an illegal contract prevented the plaintiff from recovering back the money paid under it. The same principles are followed in *Berg* v. *Sadler and Moore* (4) and *Ex parte Bell.* (5) In this case the appellant is demanding his money back because the respondents did not do something that was illegal. It would be an offence under the Street Betting Act, 1906, to send boys out to make bets with street bookmakers. The existence of an organization of this sort would involve an arrangement with the bookmakers that they should take up known positions and therefore it would involve aiding and abetting loitering for the purpose of accepting bets: see *Airton* v. *Scott.* (6) The right to obtain the return of money given to an agent for application for an illegal purpose if it has not been applied for that purpose only arises if the mandate to apply for an illegal purpose is withdrawn before it is so applicable: *Taylor* v. *Lendey.* (7) Even then it is only recoverable if the purpose for which the money was to be applied was illegal but not disgraceful: *Aubert* v. *Walsh.* (8)

[MacKinnon L.J. If the defendant had repented of his intention before the race was run he might have got his money back but it is too late after the date when it was to be applied for the illegal purpose.]

Even beforehand the money would not be recoverable if given to the agent for application for a disgraceful purpose:

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(1) [1892] 2 Q. B. 724.
(2) (1876) 1 Q. B. D. 291, 300.
(3) (1890) 24 Q. B. D. 742, 746.
(4) [1937] 2 K. B. 158.
(5) (1813) 1 M. & S. 751.
(6) (1909) 73 J. P. 248.
(7) 9 East, 49.
(8) (1810–12) 3 Taunt. 277.

Tappenden v. *Randall.* (1) The only authority to the contrary is *Taylor* v. *Lendey.* (2)

P. B. Morle in reply. Quite independently of any question of a locus pœnitentiæ, the money is recoverable by the principal from his agent so long as the agent retains the principal's money in his hands. The agent cannot escape from his liability to account while the money is still retained by him. It is a liability arising out of the relation of principal and agent.

[LUXMOORE L.J. As soon as the facts came out at the trial and showed that the money was to be applied for an illegal purpose, the Court would refuse to help the principal.]

That may be the result when one principal has paid money to another principal, but not as between principal and agent: see Broom's Legal Maxims, 9th ed., p. 470. The other side relied on *Scott* v. *Brown, Doering, McNab & Co.* (3), but it is not suggested that the money is recoverable after the instructions have been carried out. The whole basis of the right to recover is that nothing illegal has been done. The claimant is not driven to rely on any illegality and the Court will not prevent recovery because there has been an illegal intention which has not been carried out.

Cur. adv. vult.

1940. Aug. 1. MACKINNON L.J. This is an appeal from the judgment of Stable J., by which he dismissed the defendant Mason's counterclaim. The plaintiffs are bookmakers. The defendant, having apparently amassed a considerable fortune in the City, was minded to increase it—or perhaps, dissipate it—by betting, at first upon racing greyhounds, and later, upon the Turf. The plaintiffs' claim in the action was for 8100*l.*, said to be due upon an account. As that claim was manifestly in respect of bets, though the defendant did not plead the Gaming Act, the plaintiffs did not pursue it; and the hearing was concerned only with the defendant's counterclaim.

That counterclaim was for 11,875*l.* as damages for fraudulent misrepresentations by Parker acting for the plaintiffs. The defendant's case was that in October, 1937, he was minded to stake 12,000*l.* on the possible success of an inferior horse called "Another Greek" in an inferior race at Nottingham. He alleged that Abraham Stein, commonly known as Harry Parker, promised that if the defendant would give him a commission upon "Another Greek" of 6000*l.* each way, at starting price, he, Parker, would execute that commission first by placing 6000*l.* with street bookmakers by means of his organization of boys upon bicycles, provided that the defendant paid him 6000*l.* in advance for this purpose. Secondly, that he, Parker, would place the remaining 6000*l.* with other bookmakers in various parts of the country; and, thirdly, that Parker would so carry out these extensive bets that news of them would not get to the course before the start, so as to affect the starting price unfavourably. The defendant alleged, fourthly, that it was agreed between them that the defendant should attend the race, and in order to further the advantageous starting-price of "Another Greek," which was in fact the property of Mason, though not registered in his name, he should ostentatiously make a bet on another horse with Parker, which was to be a sham bet.

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(1) (1801) 2 Bos. & Pul. 467.

(2) 9 East, 49.

(3) [1892] 2 Q. B. 724.

The defendant in fact paid 6000*l.* to Parker a day or two before the race. He also went to Nottingham and he did make a considerable bet on a horse called "Tuan," with Parker, which was not a real bet.

The race took place; and "Another Greek" was completely unsuccessful. If it had won, the defendant would have made 36,000*l.* As it lost he shortly after paid the plaintiffs the second 6000*l.*, less a sum of 125*l.* that they owed him on another transaction.

By his counterclaim in this action, Mason claimed to recover back the 11,875*l.* so paid to Parker and his company as damages for fraud, or as money received by the company to his use. He alleged that the three representations I have specified above were false; and that Parker had never fulfilled his promises. He had no boys on bicycles; he had not placed 6000*l.* with street bookmakers; and he had not placed 6000*l.*

with other bookmakers. Parker admitted that this was so: but denied that he had ever made the promises or representations. He alleged that Mason simply made a straight bet of 6000*l.* each way on "Another Greek" with himself, Parker. Upon this conflict of testimony between Mason and Parker Stable J. has believed Mason and disbelieved Parker. He finds that the representations and promises were made by Parker substantially as alleged by Mason, and as above set out.

There is one other crucial matter. On November 30, 1938, two days before the issue of the writ in this action, Parker and Mason had a somewhat acrimonious interview. Mason took the precaution of having a recording apparatus at work unknown to Parker. The machine, notwithstanding the strain of Parker's epithets, faithfully recorded every word they uttered and its record was put in evidence, with Parker's epithets indicated by blanks, in deference to forensic decorum. It appeared from that record that Mason asserted, and Parker practically admitted, that about a fortnight before the arrangement as to the Nottingham race, Parker said of a race at Warwick, in which there were eight runners: "We ought to have run. I've got seven of the jockeys squared."

The learned judge was not unnaturally struck by that passage. He delivered two judgments: the first as to the facts, the second as to the law. In the former his material conclusion is in this passage: " Mr. Parker was to set to work "the rest of his organisation, and he was to ensure the same "desirable result at Nottingham as could have been achieved "at Warwick, and by the same method. That is what Mr. "Mason thought the bargain was, and that is what the bargain "in fact was that was made between Mr. Parker and Mr. "Mason. It is true that Mr. Parker had other views in his "mind. Mr. Mason thought that he and Mr. Parker were "going to cheat the public, the bookmakers, the owners of the "other horses in the race, the people who backed the other "horses in the race, and I have no doubt a good many other "people besides. That is what Mr. Mason thought the plan "was. Mr. Parker's idea was to swindle Mr. Mason. He was "not going to put this money on all over the country; he was

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"going to lay the horse himself, and he did lay it, with some "confidence. Whether that confidence was engendered by "the view Mr. Parker took of the horse's chances, or whether "it rested on other and much more substantial grounds, I do "not know." In the latter judgment he puts it thus: "The "inference that I drew from the evidence before me was that "Mr. Mason was induced by Mr. Parker to hand over to Mr. "Parker the sum of 6000*l.*, and he subsequently paid over the "balance induced by Mr. Parker's representations—I am "summarising it—(1.) that he, Mr. Parker, had a most remarkable organisation which enabled him to spread bets all over "the country with a very large number of bookmakers; and "(2.) that he had an even more remarkable organisation which "enabled him by bribing the jockeys to ensure the horse that "had been selected for the operation was as certain as anything "in this world can be certain to win the particular race."

It was, of course, no part of Mason's account of the bargain that Parker made with him about "Another Greek" at Nottingham that Parker agreed to square the other jockeys in that race. Mason had no compunction in saying that Parker agreed to break the law (as laid down in the Street Betting Act, 1906) by placing the 6000*l.* with street bookmakers, and no compunction in avowing that he himself agreed to deceive the public by making a sham bet with Parker on the course. But even Mason would feel some difficulty in avowing that he paid this great sum to Parker upon Parker's actually promising that he would square the other jockeys and ensure the victory of "Another Greek."

I doubt whether the learned judge was justified in finding that there was any express bargain between this precious pair that Parker should square the other jockeys. But Mason was suing for damages for fraudulent misrepresentation. In considering what Parker did represent, the judge was not only entitled, but was bound, to consider all that Parker represented. And if, just before the particular interview, Parker did represent that he could square all the jockeys in the race, the judge was entitled to conclude that that was one of the material representations on the strength of which, and in reliance upon which, Mason parted with his money. Nor is it surprising that he concluded that Mason did so rely. For such reliance would explain two things that otherwise, upon Mason's story, seem inexplicable. First, if "Another "Greek's" victory was to be assured, one could understand why Mason should risk 12,000*l*. on this inferior creature: that his trainer thought well of him does not seem convincing. Secondly, on Mason's story Parker was to get no remuneration for himself for placing this large sum with other bookmakers. But if the result was to be a certainty, he could make sure of his own reward.

The conclusion in law at which Stable J. arrived was that, though Parker's fraud was established, Mason could not recover his money. His claim was a turpis causa, and ex turpi causa non oritur actio.

Subject to the qualification I have made above, I think the judge's conclusions as to the facts were amply justified by the evidence. And I think his decision as to the law was correct. Quite apart from the question about squaring the jockeys, the bargain proved and relied on by Mason involved two illegalities. First, that in defiance of the Street Betting Act, 1906, Parker should make bets to the tune of 6000*l*. with street bookmakers; and, secondly, that Parker and Mason conspired to get Mason to make a sham bet on the course to deceive the public. I think those facts would suffice to taint the transaction with illegality, and to disentitle either party to sue the other in a Court of Law. But as I have also said, I think the evidence showed while Mason's cause of action was for damages for Parker's fraudulent representations, part of those representations, and a part on which Mason relied, when he paid his money, was that Parker was in a position to square all the competing jockeys in a race. And if they had in terms agreed that he should do so, this, of course, would have been an illegality for which it would be hard to find a competent epithet.

The rule ex turpi causa non oritur actio is, of course, not a matter by way of defence. One of the earliest and clearest enunciations of it is that of Lord Mansfield, in *Holman* v.

Johnson. (1) "The objection that a contract is immoral or "illegal as between plaintiff and defendant sounds at all times "very ill in the mouth of the defendant. It is not for his "sake, however, that the objection is ever allowed; but it "is founded in general principles of policy, which the defendant "has the advantage of, contrary to the real justice, as between "him and the plaintiff, by accident, if I may so say. The "principle of public policy is this: ex dolo malo non oritur "actio. No court will lend its aid to a man who founds his "cause of action upon an immoral or an illegal act. If, from "the plaintiff's own stating or otherwise, the cause of action "appears to arise ex turpi causa or the transgression of a "positive law of this country, there the court says he has no "right to be assisted. It is upon that ground the court goes; "not for the sake of the defendant, but because they will not "lend their aid to such a plaintiff. So if the plaintiff and "defendant were to change sides, and the defendant was to "bring his action against the plaintiff, the latter would then "have the advantage of it; for where both are equally in "fault, potior est conditio defendentis." The Court drives both parties from its presence: Procul este profani. No judgment will be given: no order made as to costs.

Mr. Miller argued that, as Parker never carried out the illegal purpose for which he received the money, Mason could claim its return. It is true that in such a case a locus pœnitentiæ has been allowed to one of the guilty parties. But to attempt to apply it to this case is to misapprehend the rule. If repentance takes place before the time for performance of the illegal purpose, the penitent may claim return of his money. But if, as here, the time for performance has passed, the repentance of one is of no avail, and he cannot claim his money on the ground that his partner in guilt has not in fact performed his promise, but merely pocketed the money. In truth, it is not necessary to invoke that consideration for, on his own showing, Mason has, to the best of his ability, carried out his part of the illegal compact by paying 6000*l.* to be invested with street bookmakers, and by making the illusory bet upon "Tuan."

(1) (1775) 1 Cowp. 343.

Mr. Miller also suggested that this rule as to the effect of illegality, applicable as to the parties to a contract tainted with illegality, did not apply when those parties happened to be principal and agent. I think there is no foundation whatever for the suggestion.

In the result I think this appeal must be dismissed without costs to either party. I regret that this is the only order which the Court can make. I observe in the gramophone record of the interview of November 30, 1938, a remark by Parker: "If you are connecting me with two jockeys, or any —— jockeys "that rode in the race, or that I have done any business with "any —— jockeys that rode in that —— race, then I will "give 20,000*l.* to any —— charity." The blanks represent the man's incommunicable epithets. I only wish that it were possible for this Court to order Parker to pay this ill-gotten 11,875*l.* to a *deserving* charity. But, alas, we have no such power.

LUXMOORE L.J. The appellant, Bernard William Mason, is said to have made a considerable fortune in the City of London before he took to betting. His earliest essays in this pastime appear to have taken place shortly before the year 1937; and to have been confined to greyhound racing. Many of his bets were made with the respondent company, which was incorporated with limited liability to carry on the business of a bookmaker or, as it is more euphemistically called, a turf commission agent. The respondent, Abraham Stein, who was at all material times known as Harry Parker, and his brother were the only shareholders in the company, whose business was conducted practically entirely by Harry Parker. Mason's betting transactions from the start involved considerable sums of money. As an example of their nature, Mason stated in his evidence that on one occasion he laid a sum of 1800*l.* on a greyhound to win a sum of 400*l.* Whether Mason's betting transactions on greyhounds were profitable or the reverse, was not disclosed by the evidence.

In the early part of 1937, Mason decided to start betting on

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horses, and in furtherance of this project he bought a number of horses, none of which appears to have had any particular merit. Mason's judgment with regard to the points of a horse, and his knowledge of horse-racing and betting appear to have been but slight; and Parker did not attempt to conceal in the witness-box that he had the meanest opinion of Mason's judgment and knowledge in respect of these matters. During the hearing of this appeal, Mason was referred to as "a sports-"man" and as "a man interested in the sport of horse-racing." There is not a scintilla of evidence to warrant the use of those phrases as descriptive of Mason's attitude to horse-racing. Two facts stand out with complete clarity: first, that Mason's object in buying horses and running them on the Turf was to make money; and, secondly, that he was not hampered by any squeamishness as to the means to be employed in attaining his end.

The sordid story, so far as it is material to be considered, begins in the late summer or early autumn of 1937, with the running of one of Mason's horses called "Another Greek" in an unimportant handicap race at Nottingham. The horse had run on several previous occasions without any particular success, although Mason had backed it to win considerable sums. It ran second on one occasion. Parker had evidently realized that Mason was ready and willing to back his own horses for large sums and, having regard to the view he took of Mason's judgment and knowledge, he was anxious to confine Mason's betting transactions as far as possible to the company. He had approached Mason at some earlier date, and had told him that he ought not to bet promiscuously, but should confine his efforts to bringing off a substantial coup when he thought one of his horses had a chance of winning. In the course of a conversation between Mason and Parker at or after Warwick Races on September 13, 1937, Parker told Mason, according to Mason's story, that in one of the races in which there were eight runners, he (Parker) had been able to square seven of the jockeys, and expressed regret that Mason's horse, "Another "Greek," had not been running; the obvious inference being that in that event Parker's assistance would have ensured a profitable race for Mason and himself. Stable J. has found that some such claim was made by Parker; and on the evidence he was justified in doing so. Shortly after this conversation, Mason told Parker that he wished to back "Another Greek" in a race to be run at Nottingham on October 4, 1937, by placing the large sum of 12,000*l.* on his horse at starting price, 6000*l.* was to be for a win, and the remaining 6000*l.* for a place. According to Mason's story, Parker encouraged him in this project; and told him that if the commission was entrusted to the company, he would be able to place 3000*l.* out of each sum of 6000*l.* with street bookmakers in such a way that no part of it would come back to the course, and so reduce the starting price. Of the two remaining sums of 3000*l.*, all except 500*l.* in each case would be placed with other bookmakers so that no part of it could get back to the course, and the starting price would remain unaffected. Parker further suggested that in order to keep the starting price as low as possible, Mason should be present on the course immediately before the race, and should make with Parker, and as publicly as possible, a substantial bet on some horse running in the race other than "Another Greek," it being understood that as between Mason and Parker this bet was not to be effective. To induce Mason to enter into this arrangement, Parker told him that he had under his control an organized band of youths provided with satchels in which the money and particulars of the bets to be made were placed. Those satchels were locked shortly before the time fixed for the race and handed to the youths, who mounted their bicycles, and delivered the satchels to a number of street bookmakers, who were in the habit of accepting bets made by Parker for his clients through this agency. Parker required Mason to pay 6000*l.* in cash to the Company's banking account on the day before the race, so that the Company and Parker might have the necessary funds to make the requisite bets with the street bookmakers. Mason said he agreed to fall in with this arrangement; and there is no doubt that on September 30, 1937, he wrote to the manager of his bank instructing him to pay into the company's banking account the sum of 6000*l.* already mentioned. Needless to say, Parker denied that any such arrangement was suggested or made.

According to his evidence, the transactions between Mason and Parker were straight bets of 6000*l.* each way on "Another Greek." Stable J. was not impressed with the evidence of Mason or Parker, indeed, he said he was not prepared to accept the word of either unless it should be corroborated. He held that there was sufficient corroboration of Mason's evidence to compel him to accept Mason's story of the arrangement entered into. The learned judge also found that it was part of the arrangement that Parker was to "square" the jockeys engaged to ride the other horses running in the race, or as many of them as possible. In view of the fact that nothing further was said about the jockeys after the conversation at Warwick on September 13, 1937, and no suggestion was made as to the source of the proposed bribes, I do not think that Stable J. was justified in holding that it was part of the arrangement suggested by Parker and accepted by Mason with regard to the bets of 6000*l.* each way on "Another "Greek" at Nottingham. But the fact that Mason was willing to deal with Parker after that conversation, can leave little room for doubt in the mind of any ordinary person that Mason would have made no protest if Parker had taken steps to ensure the winning of Mason's horses by bribing the jockeys of other horses engaged in the race. It may well be that this conversation played some part in inducing Mason to place the bets with the company; but I think it right in the circumstances to omit it from consideration.

It is common ground that no parts of the two sums of 3000*l.* were placed with street bookmakers. Indeed, Parker admitted that the so-called organization of boys with satchels and bicycles did not exist. Further, it seems at least doubtful whether any parts of the remaining two sums of 3000*l.* were placed by Parker with any other bookmaker. The race at Nottingham was run on October 4, 1937; "Another Greek" did not win; and in due course Mason paid without protest to the company on October 11, 1937, the sum of 5875*l.*, being the balance outstanding of the 12,000*l.* bets less a sum of 125*l.*

due to Mason as the result of some other betting transaction. Later Mason had two other large betting transactions on two other horses belonging to him with the company, which resulted in his losing a further total sum of 8100*l.* Mason refused to pay any part of this sum because, as he said, he was not satisfied that the horses were not interfered with. The Company sued Mason for this sum as being due on an account stated. Mason in his defence denied that there was a stated account, and also, that he owed 8100*l.* or any other sum to the company; and, by way of counter-claim against the company and Harry Parker, claimed to have the 11,875*l.* repaid to him by the company as money had and received to his use, or, alternatively, by way of damages for fraudulent misrepresentation, the ground of the claim in the first case being that the 12,000*l.* was paid to the company to be placed out in bets with bookmakers other than the company, in pursuance of the arrangement already mentioned and that it was not so placed: while the ground of the claim in the second case was that Mason was induced by fraudulent misrepresentations to authorize the company to make bets to the extent of 12,000*l.* with other bookmakers.

When the action came on for trial the company admitted that they could not succeed in their action to recover 8100*l.*, and submitted to have it dismissed with costs. The counter-claim was heard in the first instance by the Lord Chief Justice and a Jury. After hearing Mason's evidence, the Lord Chief Justice withdrew the case from the jury and dismissed the counter-claim on the ground that there was no evidence of any arrangement being made such as that on which Mason relied, or of any misrepresentation. Mason appealed to this Court, and a new trial was ordered. The new trial was held before Stable J. without a jury. The learned judge found the facts already stated, and dismissed the counter-claim on the ground that the arrangement come to between the parties was illegal, and that the maxim "ex turpi causa non oritur actio" applied. Mason has appealed to this Court. He complains that Stable J. was not justified in holding that the arrangement made between himself and Parker acting on behalf of the company included a term that Parker should bribe the jockeys of other horses running in the race against " Another Greek " to allow the last-named horse to win: but it was frankly admitted by counsel on Mason's behalf that it was agreed that at least 6000*l.* should be placed with street bookmakers in the manner already described, and that Mason should make a pretended bet in the manner and for the purposes I have already mentioned. Mr. Miller, on Mason's behalf did not attempt to deny the illegality of either of these provisions. Indeed, it would have been plainly impossible for him so to do. He argued that the ex turpi causa rule did not apply, first, because the illegal purpose remained unfulfilled; and, secondly, because the relationship of principal and agent existed between Mason and Parker. Mr. Miller argued that the existence of such a relationship affords an exception to the rule, because the Courts will not allow an agent with money in his hands belonging to his principal, which has been received in the course of his agency, to refuse to account on the plea that the transaction is illegal; and that whether it be legal or illegal, he must return his principal's money, and fulfil the duty of accounting to him.

The first ground on which Mr. Miller relied is well recognized in the books. The ratio decidendi of the cases appears to be that public policy is best served by allowing a party to an illegal arrangement to repent before it is too late, and to prevent the completion of the illegal purpose by reclaiming the money paid by him in pursuance of it. Examples of such cases are to be found in *Hastelow* v. *Jackson* (1) and *Taylor* v. *Bowers.* (2) But in the present case, the time for the completion of the illegal arrangement was past long before the claim for repayment was made. Further, Mason has himself long since fulfilled his part of it by payment of the whole of the money to the company, and by the making of the fictitious bet with Parker, as Stable J. has found he did. There has been no repentance on Mason's part. Indeed, his complaint still is that the money he paid to the company was not employed in furtherance of the scheme for placing the sum

(1) 8 B. & Cr. 221.
(2) (1876) 1 Q. B. D. 291.

of 6000*l.* with street bookmakers, which was illegal, because it is contrary to the provisions of the Street Betting Act, 1906. Further, Mason carried out the other illegality agreed upon, namely, the making of the fictitious bet. That this was an illegal act, there can be no doubt. Its avowed object was by means of the pretended bet to keep the odds up on Mason's horse "Another Greek," by reducing those on the horse Mason pretended to back. This seems to constitute a criminal conspiracy in precisely the same way as the arrangement to rig the Stock Exchange market in respect of shares was held to be in *Scott* v. *Brown*. (1) I am satisfied that the learned judge was right in holding that Mason had carried out his part of the arrangement.

Further, so far as the 5875*l.* is concerned, Mason paid over that sum in the belief that the whole arrangement had been carried out, although, for some reason, his horse had failed to win, and the expected coup was frustrated. This being so, it is impossible to hold that Mason had any locus pœnitentiæ after the race at Nottingham had been run; and, consequently he cannot revoke the transaction and recall the money paid.

With regard to the second contention, I can see no difference in principle between the case of a principal seeking to recover money handed to an agent for an illegal purpose and that of one principal seeking to recover money paid by him to another principal in pursuance of an illegal contract. In neither case will the Court assist the parties, whether the claim be to obtain money paid for an unfulfilled or partly fulfilled illegal purpose, or by way of damages for breach of an illegal contract. As Lord Mansfield pointed out in 1775, in the passage which has already been read from the judgment in *Holman* v. *Johnson* (2), the ground upon which the Court acts is not for the sake of the defendant to such a claim, but because it will not lend its aid to the plaintiff. It is by accident that the defendant gets the advantage. If the litigants were to change sides, then the advantage would accrue to the one who is defendant, for where both are equally at fault potior est conditio defendentis.

(1) [1892] 2 Q. B. 724.

(2) 1 Cowp. 343.

In my judgment Stable J. was right in dismissing this action, leaving each party to bear his own costs. The appeal fails for the same reason, namely, that this Court will not assist either party once the illegality of the transaction has been brought to its notice. I agree that the appeal must be dismissed without any order being made as to the costs of either party.

DU PARCQ L.J. The argument which we heard on behalf of the respondents did not persuade me that the learned judge was wrong in convicting Mr. Parker of the fraud alleged against him, or rather, of that fraud in the form which it assumed when all the facts had come to light. The adverse view of Mr. Parker's conduct which the Court formed will not deprive him or the company of the solid satisfaction of retaining the considerable sum in dispute. In a sense, therefore, it may be said that the question whether or not Mr. Parker was guilty of fraud is academic. Obviously, however, a charge of fraud is always a serious matter, and I should have thought it my duty to give in some detail the reasons which lead me to accept the conclusion at which Stable J. arrived but for the fact that the recorded words of Mr. Parker, which have been sufficiently set out in the judgments already delivered, shew him to have asserted his ability and his willingness to do a grossly dishonest and criminal act for his own and a fellow conspirator's gain. It cannot be said, therefore, that the learned judge's finding of fraud in this case is tarnishing a reputation which would otherwise be unblemished ; and I think that I am not failing in my duty if I say, without further comment, that in my view there is no sufficient reason for disturbing those of the learned judge's findings of fact which are material to this part of the case.

The only remaining question is whether Mr. Mason ought to be permitted to recover judgment against Mr. Parker. I find little to criticise in the judgment of Stable J. ; but in my opinion it is at least doubtful whether he was justified in drawing the inference that it was a term of the agreement between the parties that Mr. Parker should bribe or " square "

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jockeys. The line between legitimate inference and mere surmise is difficult to draw. I confess that in the course of the hearing I was much tempted to go the whole way with the learned judge. On consideration, I think it may well be that Mr. Parker's words, spoken a fortnight before the bargain was made, amounted to no more than a representation. Mr. Mason founded no claim on those words; and I agree with Luxmoore L.J. that it is better to pay no regard to them in considering whether the claim made can be maintained in a court of law.

I am satisfied that the plot to keep up the odds by making a fictitious bet, which Mr. Mason admitted to have been "one of the elements in the scheme," was as much a criminal conspiracy as the rigging of the market which was the subject of the decision in *Scott* v. *Brown*. (1) Betting is not in itself illegal; and those who make bets honestly and lawfully are entitled, subject to well known statutory limitations, to the protection of the law. An agreement to induce intending bettors, by deceitful means, and for the benefit of the contracting parties, to believe that they will be unwise to back a horse which is likely to win, and wise to back a horse which is likely to lose, is in my opinion a criminal conspiracy. Further, the provision that 6000*l.* should be placed with street bookmakers was, in my judgment, enough of itself to make the whole contract illegal. The Street Betting Act, 1906, provides that "any person frequenting or loitering in streets or public places, "on behalf either of himself or of any other person, for the "purposes of bookmaking, or betting, or wagering, or agreeing "to bet or wager, or paying or receiving or settling bets" shall be guilty of an offence. Mr. Parker's cohort of bicyclists is said to have existed only in imagination; but it must be supposed that, even in that romantic realm, they could not have done their work without contravening the section, if it is to be construed in the light of the decision of the Divisional Court in *Airton* v. *Scott* (2), which seems never to have been questioned since it was delivered in 1909. It was suggested that the illegality of street betting would affect only 6000*l.*

(1) [1892] 2 Q. B. 724.

(2) 73 J. P. 248.

out of the total sum claimed. I do not agree with this contention. Part of the consideration offered by Mr. Parker for the payment of the whole sum involved was that a portion of it should be employed for a criminal purpose. If Mr. Parker had repudiated his promise to commit offences against the Street Betting Act, Mr. Mason would not have been bound, according to the tenour of the contract, to pay over any part of the total sum; and in the circumstances I am of opinion that the whole bargain is tainted with illegality. It might have been otherwise if the bargain had merely been that part of the sum to be paid should be used for making lawful bets and part for making illegal bets. Then the contract might well have been severable. But here the payment of the whole depended on the application of part to a criminal purpose, so that the market might not be spoiled for the conspirators.

The question now is whether Mr. Parker, having dishonestly used the whole of the money for his own purposes, can be compelled by Mr. Mason to return it. I have no doubt that if Mr. Mason had repented, and demanded the return of so much of it as had been paid before the time had come for putting the bargain into effect, he would have been entitled to the advantage of the locus pœnitentiæ which the law allows. Here there was no sign of repentance. Indeed one part of the conspiracy, the fictitious bet, had been completed. In these circumstances, I am of opinion that Mr. Mason cannot invoke the assistance of the Court to recover his money. Clearly, he cannot ask for damages for breach or non-fulfilment of a contract which, now that all its terms are known, is shown to have been a criminal conspiracy. Nor, in my opinion, is his position any more fortunate when he seeks to recover the money as money had and received to his use. He is then relying on a form of action of which Lord Haldane said in *Sinclair* v. *Brougham* (1), that it was "in theory based on a "contract which is imputed to the defendant by a fiction of "law"; and added: "The fiction can only be set up with "effect if such a contract would be valid if it really existed." The fictitious promise in this case is a promise to return money

(1) [1914] A. C. 398, 415.

paid for a consideration which has wholly failed. The answer may be made that the consideration only partly failed, because Mr. Parker at least gave the necessary collaboration in the fictitious bet. Even if this fact could be ignored, the result would still be that, by a fiction, Mr. Parker is to be taken to have said: "I promise you that if I do not carry out my "share in the criminal conspiracy upon which we have em-"barked, I will, when the time for its performance has gone by, "pay you back your money." Such a promise, if made, would be unenforceable by reason of the general rule which was stated, for instance, by Sir Richard Henn Collins M.R. in *Harse* v. *Pearl Life Assurance Co.* (1) "It is clear law that "when one of two parties to an illegal contract pays money "to the other, in pursuance of the contract, it cannot be "recovered back." To that rule there are exceptions, one of which I have already mentioned. It was submitted on Mr. Mason's behalf that this case was covered by another exception, which was said to be based on principles of commercial morality. Trusts, and the obligations of agency, said his counsel, are sacred, and nothing must be allowed to prevent the cestui que trust or the principal from claiming money from a trustee or agent, however tainted may be the transaction from which the payment of the money flowed. In my opinion, a principal seeking to recover from his agent money which he handed to him for an illegal purpose, is in no better case, when he seeks relief from a court of law, than the contracting party seeking to recover back payments made by himself to another party to the contract (who is not his agent) for an illegal consideration. In neither case will the Courts order the repayment of the money. "It does not follow," as Sir George Jessel M.R. said in *Sykes* v. *Beadon* (2), "that you cannot, in some cases, "recover money paid over to third persons in pursuance of the "contract." It is not now necessary to say more of the cases to which the learned Master of the Rolls was there alluding than that they certainly do not assist Mr. Mason. (3) No

(1) [1904] 1 K. B. 558, 563.
(2) (1879) 11 Ch. D. 170, 197.
(3) Ibid. 194.

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other way of escape from the operation of the rule ex turpi causa non oritur actio seems to me to be open to Mr. Mason unless indeed, as I think was suggested at the Bar, it is possible to put his claim on an equitable ground. As to this, I will only say that he seems to me to lack the qualification which is demanded of those who come to equity.

I agree that the appeal must be dismissed. I assume that Mr. Parker, who has no doubt been advised as to the view taken by the courts of this kind of transaction, will not ask for, or expect, an order in his favour as to costs.

Appeal and cross-appeal dismissed.

Solicitors: *Harold Eves; Lieberman, Leigh & Co.*

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THE KING *v.* COMMISSIONERS OF INLAND REVENUE.

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Aug. 2.

Ex parte GIBBS AND OTHERS.

Revenue—Income tax—Partnership—Taking of additional partner—Cesser of business of old partnership and succession thereto of new partnership—Adjustment of assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 9.

By r. 9, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, if a person charged to tax under Sch. D ceases within the year of assessment to carry on the trade, etc., in respect of which the assessment is made and is succeeded by another person, then by r. 9, sub-r. 2, the Commissioners shall adjust the assessment as directed.

A partnership of four stockbrokers took in a fifth, and a month later a sixth partner and thereafter continued to carry on business as stockbrokers. On a motion for a writ to prohibit the Commissioners from adjusting the assessment of the partnership :—

Held, that the condition precedent to the operation of r. 9, namely, that a person has ceased to carry on a business and has been succeeded therein by another person, was not fulfilled by the circumstances of the case, and therefore the Inspector of Taxes had no right or duty to give a certificate under r. 9, sub-r. 1, and the Commissioners had no jurisdiction to adjust the assessment under r. 9, sub-r. 2.

Per Scott L.J. Rule 9 operates only where there is in a business sense a real "ceasing" and "succeeding"; it deals primarily with one person (natural or juridical) as either "cessor" or "successor"; and it only extends to a plurality of persons, acting jointly, where there is a complete transfer from the one group to the other, or from a group to an individual, or vice versa. In such a case a whole partnership, ceasing or succeeding, might come within r. 9, but otherwise that rule has nothing to do with partnerships.

Decision of Divisional Court, ante, p. 242, reversed.

APPEAL from Divisional Court.

On November 5, 1937, an assessment to income tax was made under Case I. of Sch. D to the Income Tax Act, 1918, on the firm of Sir R. W. Carden & Co., stock and share brokers, the partners in which were then four of the present applicants, A. Gibbs, B. N. Gibbs, F. L. J. Rogerson, and J. Moffatt. On February 7, 1938, these four partners took

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into partnership the fifth applicant, D. E. West. No notice requiring a fresh computation under the proviso to r. 11, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D, to the Act of 1918, as amended by s. 32, sub-s. 1, of the Finance Act, 1926, was then given by the partners, but on April 1, after a sixth partner had on March 22 been taken in it was duly given. None the less, on July 27, 1938, the Inspector of Taxes for the City of London issued his certificate under r. 9, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D. (1) The applicants then moved the Divisional Court for leave to issue a writ of prohibition to prohibit the Commissioners for the General Purposes of the Income Tax for the City of London from adjusting the assessment under r. 9, sub-r. 2. The Divisional Court refused the application, and the applicants now appealed. The appeal was heard on July 8, 9, 1940.

The question for decision was whether when D. E. West was taken into partnership, the original four partners assessed ceased within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment was made, and were succeeded therein by another " person " within the meaning of r. 9. The arguments of counsel sufficiently appear from the judgments.

Cyril King K.C. and *Frederick Grant* for the applicants.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Inspector of Taxes.

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Rules applicable to Cases I. and II., Rule 9: "(1.) If a person charged "under this Schedule ceases within "the year of assessment to carry "on the trade, profession, or "vocation in respect of which the "assessment is made, and is "succeeded therein by another "person, the surveyor shall . . . . "certify to the general commissioners for the division in which "the assessment is made the particulars thereof, and the full "name and residence of the person "charged and of his successor ". . . ."

"(2.) On receipt of the certificate the commissioners . . . . "after examination of the said "persons, if they attend, or on "other satisfactory proof of the "facts . . . . shall adjust the "assessment by charging the successor with a fair proportion "thereof from the time of his "succeeding to the trade, profession, or vocation, and relieving "the person originally charged "from a like amount."

J. S. Scrimgeour for the City Commissioners.

Cur. adv. vult.

1940. Aug. 2. SCOTT L.J. This appeal from an order of the Divisional Court, refusing a prohibition, raises an income tax question between the revenue and a firm of London stockbrokers. During the year of assessment there had been a change in the firm through its taking in a new partner on February 7, 1938, and also a falling off of its profits below its current assessment under Sch. D. The Revenue claimed to act upon a power conferred by r. 9 of the Rules applicable to Cases I. and II. of Sch. D, to apportion the existing assessment between the periods of the year before and after the change, on the footing that one firm had "ceased to carry on the business," and had been "succeeded" by a new firm. The procedure laid down by the rule had been strictly followed, and, if the rule were applicable, the result claimed by the Revenue, namely, that the existing assessment as apportioned became unalterably binding, would prima facie seem to follow. For reasons which I will state presently, I do not think we need decide whether it would have followed to the extent of excluding all possibility of escape from the existing assessment. The firm contended that the rule had no application to such a change in the constitution of a partnership, and that it was limited to a case of one person really ceasing to carry on a business and another person succeeding to it; and they pointed out that rr. 10 and 11 are addressed to the rights and obligations of partnerships, and that under the proviso to r. 11, sub-r. 1, all the partners, both before and after a change, are given the express right, by a notice signed by all of them, to require the tax to be computed as if the trade had been discontinued at the date of the change and a new trade then commenced.

This option was, in my opinion, clearly granted by Parliament for the purpose of conferring an absolute right to require the Revenue to reduce the assessment based on the income of the previous period (then a three

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years' average) to the lower level of the actual income in the year of assessment. The interpretation of r. 9 claimed by the Revenue and adopted by the Divisional Court, if correct, would be wholly inconsistent with the taxpayer's right of reduction under r. 11; for the procedure of r. 9 is mandatory. Under sub-r. 1 the Inspector of Taxes gives a certificate to the General Commissioners of the Division (in this case the City of London) that one person has ceased to carry on the trade and another has succeeded; of the date; and of the apportionment by time. Thereupon under sub-r. 2 the Commissioners are required to make a fair adjustment, charging the successor and relieving the person originally charged, accordingly. By sub-r. 3 that determination is final and binding.

In the present case (but not till July 27, 1938) the Inspector of Taxes (who by amending legislation has taken the place of the Surveyor under r. 9) issued his certificate, purporting to act under the rule, certifying the amount of the assessed profits of the firm of "Sir R. W. Carden & Co.," the date of change as February 7, 1938, the name of the "successor" as Sir R. W. Carden & Co., and the apportioned amount of the assessment to be charged to the "successor" at a certain figure. He gave four names of partners before the change, whom I shall call A, B, C and D, with a fifth, E, after the change.

There is an earlier event, necessary to complete the story. On March 22, 1938, the firm of five agreed to take in a sixth partner as from the 25th of that month; I call him F. There was also a "Stock Exchange partner," a Mr. Heathcoat-Amory, both before February 7 and after March 25, but he had no share in the firm's profits, and does not play any part in the story (except in the notice next to be mentioned) and I ignore him. On April 1, in accordance with the proviso to r. 11, sub-r. 1, all the partners (including F) sent a written notice to the Surveyor of Taxes requiring computation of the tax payable "as if the said trade, profession or vocation had "been discontinued at the date of the said change and a new "trade, profession or vocation had then been set up or "commenced." It will be observed that the firm contented itself with a requisition in respect of the change of March 25 and did not make any requisition in respect of the change on February 7. The business was carried on after each of those dates as before; it was continued and not discontinued. The procedure of r. 9 was duly followed by the Revenue. On November 22, 1939, the clerk to the City Commissioners notified the firm that on February 6, 1940, the Commissioners would meet to consider the Inspector's certificate of July 27, 1939. The firm, considering that r. 9 did not apply to a mere change in a partnership where the business continued, but doubtless supposing that if the Commissioners acted upon the certificate their "adjustment" might bind the firm finally to the old assessment, apportioned between the old and new firms, decided to move in the King's Bench Division for a prohibition to prevent the Commissioners so acting. The necessary "statement" under the new procedure was filed in the King's Bench Division, with an affidavit sworn on January 3, 1940, by the senior partner. It contains all the facts. The King's Bench Division dismissed the motion. The appeal is from that decision.

In my opinion the motion should have been allowed. If the conditions precedent to the jurisdiction of the Inspector to certify, and of the Commissioners to adjust, imposed by r. 9, had not been fulfilled, neither authority had jurisdiction to act; and in view of the mandatory language of the rule, and the express provision of sub-r. 3, I think the present appellants were entitled to pray in aid the disciplinary control of the King's Bench, and were not driven to rely only on a possible but problematical defence to a subsequent claim of the Revenue to enforce tax liability on the basis of the old assessment. Prohibition lies as of right for any excess of jurisdiction by even a quasi-judicial tribunal (see per Atkin L.J. in *Rex* v. *Electricity Commissioners* (1)), and the fact, if it were a fact, that some other provision of income tax legislation might possibly afford a defence, would not give the Divisional Court a discretion to refuse the order.

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(1) [1924] 1 K. B. 171, 204–5.

Our decision depends directly on the interpretation of r. 9, but if there be an ambiguity in that rule, then indirectly upon rr. 10 and 11—with possible assistance from other provisions, past and present, which may throw light on r. 9. That rule was first introduced as s. 62 of the Taxes Management Act, 1880. It appeared in Part IV. of that Act, the title of which was "Assessment." Sect. 61 was entitled "Books on "Assessment," s. 62 "Changes," and s. 63 "Omission from first assessments." It would appear, therefore, that s. 62 was a machinery provision, and not a section either charging or releasing from charge; its purpose was collection. A discretionary kind of release from liability on discontinuance of a trade, and on a falling off of profits by deprivation of a source from a specific cause, was already allowed by s. 134 of the Act of 1842. A successor to a business was by that section required to pay on the existing assessment, but if he could prove a falling off of its profits from a specific cause he could get similar relief. These immunities and reliefs were made more definite, in favour of the taxpayer, by s. 24, sub-ss. 2 and 3, of the Finance Act, 1907; and in the 1918 Act those provisions became r. 8, sub-rr. 1 and 2, of the Rules applicable to Cases I. and II.—the rule next preceding the crucial rule in this appeal. The next following rule, r. 10, provides for a statement by the senior partner of the profits of the business, and for a joint assessment in the partnership name. The use of the word "person," characteristic of r. 9, is dropped, and the new subject-matter is "partnership." Ordinarily the subject-matter of r. 9 is the case of one proprietor of a business giving it up and another acquiring it as a going concern—for example, on a sale. Sect. 19 of the Interpretation Act, 1889, of course applies to the word "person" in r. 9 "so far as the context permits." The context would obviously permit of its including the plural in case of one firm selling the business as a going concern to an individual or company, or to a wholly different firm. But I do not think that it is a natural use of language to say that a firm ceases to carry on its business, and that another firm succeeds to the business, when all that happens is, for instance, that a young managing clerk has become a very junior partner with a tiny percentage of the firm's profits added to his salary. It is necessary to test the argument of the Attorney-General by such an extreme case; for his contention is necessarily one of law and not of fact. He says that such a change connotes a cesser and succession within the meaning of the rule. I cannot agree. If it be a question of fact, and the substance of that event is to be regarded, again I cannot agree; and the Commissioners have found against him, and it cannot be said that there was no evidence to support that finding.

The natural construction of rr. 9, 10 and 11, read together, is that r. 9 operates only where there is in a business sense a real "ceasing" and "succeeding"; it deals primarily with one person (natural or juridical) as either "cessor" or "successor"; and it only extends to a plurality of such persons, acting jointly, where there is a complete transfer from the one group to the other, or from a group to an individual, or vice versa. In such a case a whole partnership, ceasing or succeeding, might come within r. 9, but otherwise r. 9 has nothing to do with partnerships. It is rr. 10 and 11 which deal with partnerships, the function of r. 10 being only to introduce the machinery for assessing them. So viewed, those two rules naturally follow r. 9, and rr. 8 to 11 form a small, self-contained group. Rule 8 deals with the complete discontinuance of an old business, and the setting up of a new. Rule 9 deals with a continuing business, but a total change of the person chargeable. Rule 11 also deals with a continuing business, but not with a total change in the personnel carrying it on (which has been disposed of by r. 9), but with the special case of a partnership where alone a partial change in the personnel chargeable can and very frequently does take place; and confers on the persons chargeable a substantial benefit where the actual income has fallen below the assessed income, by deeming the change to be a discontinuance of the business within r. 8. Rule 11 in its present form was enacted by s. 32 of the Finance Act, 1926, in place of the old rule as enacted in the Income Tax

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Act, 1918; which in its turn had in large measure re-enacted the fourth rule applicable to Cases I. and II. under s. 100 of the Act of 1842 (Dowell, 7th ed., p. 296). The plain distinction between a change in a partnership on the one hand, and a succession on the other, appears perhaps even more clearly in the wording of 1842 and 1918, than in 1926; although in the wording of 1926 it is also clear enough. As an aid to the interpretation of r. 9 in the 1918 Act, the more relevant version of r. 11 to consider is that which was enacted by Parliament in the same Act. The chief materiality of the 1926 version is that it seems to me tacitly to assume that the contrasted interpretations of rr. 9 and 11 in the 1918 Act which I have expressed, are correct; and the Finance Act of 1926 provides that its Income Tax Part is to be read as one with the 1918 Act. The old antithesis between an internal change in a partnership, and an external succession to its business, is maintained and emphasized in two ways; the separate and contrasted ideas are put into separate subsections; and the changing and changed partnership is given a new relief from tax in the shape of an option to all the partners, old and new together, to require that the Revenue shall apply the provisions of r. 8 as if there had been a discontinuance of the old business and a setting up of a new: the language of the option necessarily implying that there has in fact been no discontinuance. This right is obviously of great value to the taxpayer, in case the actual profits have fallen below the assessment; it is the very opposite of the provision of r. 9, which forbids any escape by the taxpayer from the existing assessment, and commands a mere apportionment of it. The old r. 11 was similar in its effect, though rather less beneficial to the taxpayer. The antithesis between taking a new partner into the partnership and ceasing to carry on the business and giving place to a successor is obviously fundamental, and appears to me of itself to show that the idea of succession is intended not to include a mere internal change in the personnel of a partnership.

Michael Faraday, Rodgers & Eller v. *Carter* (1) was cited

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(1) (1927) 11 Tax Cas. 565.

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to us on behalf of the Revenue, as a decision by Rowlatt J., or at least an expression of opinion by him, that a change in a partnership constitutes a "succession" within r. 9. It cannot in my view be so regarded, and if it can I disagree with it. In that case A and B dissolved partnership in November, 1922. A continued the old partnership business. In December A took C into partnership. Those are the main facts of the case. But one other question arose. B carried on a very small part of the old business in his private house for a short time—till after C's entry into the business. The General Commissioners treated this continuation by B as negligible and disregarded it, but held that A and C together had "succeeded" to A and B within the meaning of the old r. 11 of the Act of 1918. The learned judge used the same word. The question at issue in the present appeal was never raised by the special case, nor was it argued before the learned judge; and whether the event was a change in the partnership or a succession was wholly immaterial to the application of the old rule. The use of the word "succession" was, in my opinion, simply a slip.

The appeal must be allowed and the order for a prohibition made.

Clauson L.J. The judgment I am about to read is the judgment of Goddard L.J. and myself. We do not propose to restate the facts which give rise to the present appeal. They are fully stated in the judgment of the King's Bench Division. The sole point for the decision of this Court may be formulated as follows. During the course of the year of assessment a partnership of four persons carrying on the trade in respect of which the assessment is made takes in a fifth partner. It is suggested on behalf of the Revenue authorities that this circumstance makes it the right, and indeed the duty, of the appropriate officer to set in motion the machinery detailed in r. 9 of the rules governing Sch. D, Cases I. and II., in the Income Tax Act, 1918, and makes it the right, and indeed the duty, of the appropriate General Commissioners to deal with the assessment by apportioning liability in respect of it between the original four partners on the one hand and the new partnership of five partners on the other.

On a perusal of r. 9 it becomes clear that the machinery for apportionment provided by the rule is to operate only if a person carrying on the trade in respect of which the assessment is made ceases within the year of assessment to carry it on, and is succeeded therein by another person. The language seems to be wholly inappropriate to the present case. The four original partners do not cease to carry on the trade: they continue to carry it on with the co-operation of a fifth person. That person in no sense succeeds to the trade: he joins in carrying on the trade. On the language of the rule it appears to be wholly inapt to cover the case. The rule seems obviously framed to meet the wholly different case where the business passes, whether on sale or devolution on death, from one owner to another owner, and to be aimed at adjusting the claims of the Revenue against the two successive owners, so as to throw the appropriate burden and liability on each.

Rule 9 is a re-enactment in 1918 of s. 62, of the Taxes Management Act, 1880. In the year 1880, the computation of duty arising in respect of a trade in the case where there was a duality or plurality of ownership in the course of the year, was regulated by certain provisions which appear in the Income Tax Act, 1842, s. 100, as rr. 3 and 4 applying to Sch. D, Cases I. and II. Rule 3 dealt with the method of assessing partners jointly upon a return made by one of them: Rule 4, supplemented by s. 134 of the Act of 1842, dealt with the case of a change in a partnership carrying on a trade within the period covered by the assessment of the trade so carried on, and also with the case of one person succeeding within that period of the business in respect of which the assessment was made: the change or succession was not to affect the assessment, except on proof of a diminution of profits due to a specific alleged cause: but on proof that the person charged had ceased during the period to carry on the trade, he might apply to the General Commissioners for an amendment of the assessment, so as to give him such relief as should be just: but if a person succeeded to the business of the party charged the successor was to be liable to the full duties as assessed without any new assessment, except on proof of a diminution of profits due to a specific cause. This statutory position was altered by s. 62, of the Taxes Management Act, 1880, which is for all practical purposes in the same form as the present r. 9. It seems reasonably clear that s. 62 relates, and relates only, to the case where the person assessed ceases to carry on the concern (which is the word used in s. 62) in respect of which the assessment is made, and is succeeded therein by another person. In other words the provision made by s. 62 for setting up the machinery for apportioning the assessment as between the person ceasing to carry on the business and the person succeeding him therein deals with the cases of succession dealt with in the latter part of the then r. 4, and has no concern with the cases of change in a partnership dealt with in the earlier part of r. 4.

The only method of construing either the present r. 9, or its predecessor s. 62 of the Act of 1880, so as to apply to such a case as the present, is to treat the partnership consisting of the four original partners as one person, and the partnership consisting of five partners as another person, and then treating the four original partners (contrary to the obvious fact) as ceasing to carry on the business, and the new partnership consisting of the four original partners and the new partner (contrary to the obvious fact) as succeeding to the business. This, as we understand it, is the method of dealing with the matter adopted by the King's Bench Division in the judgment now under appeal, and is their justification for holding that r. 9 applies to the circumstances of the present case. We cannot see any reason for adopting such a highly artificial view: and, indeed, had the case been one to which the legislation as it stood immediately after s. 62 of the Act of 1880 had come into force applied, we can scarcely think that any mind, however ingenious, would have made any such suggestion. The legislation as it stood after the Act of 1880 came into force was re-enacted, with alterations of form, in the Income Tax

Act, 1918. Sect. 62 of the Act of 1880 was reproduced in r. 9, and the substance of rr. 3 and 4 of Sch. D, Cases I. and II., in s. 100, reproduced in rr. 10 and 11, and had r. 11 remained as it appeared in the Act of 1918, the same observations would apply, and we venture to think that the suggestion which the King's Bench Division adopted could hardly have been made. A radical alteration in the law was, however, made by the Finance Act, 1926, the purpose of which, as is well known, was to get rid of the old method of assessing business profits on an average of the preceding three years' profits, and to substitute an assessment by reference to the last preceding year's profits. As part of the change r. 11, as it had stood up to that time, was repealed, and a new r. 11 was substituted: and it is from the terms of the new r. 11 that the suggestion derives any claims to plausibility which it possesses. We do not propose to recite the new rule at length: we can summarise its effect with sufficient accuracy for the present purpose as follows. The first sub-section deals with a case where a change occurs in a partnership but one of the partners at least continues in the partnership: such a change is not to affect the assessment, but if all the persons concerned choose to ask for a reassessment to be made, as if at the moment of the change in the partnership the trade had been discontinued and a new trade had been set up, such a reassessment is to be made. Sub-r. 2 deals with the case where a person succeeds to a business which, until that time, was carried on by another, and the case is not one to which sub-r. 1 applies, and it is enacted that the tax payable is to be computed as if the successor had set up a new business at the moment of succession, and as if the business theretofore carried on had been discontinued at the same moment. The sub-rule goes on to provide that references in this sub-r. 2 to a person include references to a partnership.

The argument which found favour with the King's Bench Division was, as we understand it, as follows. It is said that the language of sub-r. 2 necessarily implies that a case to which sub-r. 1 applies (that is, a case of change in the personnel of a partnership where one partner continues) is a case where one person succeeds to a business previously carried on by another person, and therefore necessarily implies that a change in the constitution of a partnership is regarded by the legislature as a case where there is a succession in regard to the trade between one person or group of persons (for the singular includes the plural), consisting of the original four partners, on the one hand, and another person or group of persons, consisting of the four original partners plus the new partner on the other, and accordingly r. 9 applies to this succession, and the condition is fulfilled which brings r. 9 into operation.

We doubt whether it is legitimate to use the new r. 11 as altering the meaning of r. 9, for that is really what the argument involves. However, waiving this point, we are quite unable to read the words in sub-r. 2 "and the case is not one to which "paragraph (1.) of this Rule applies" as amounting to a positive enactment that although a change in a partnership which carries on a business where one partner continues after the change is not in fact, and has never been treated in Income Tax legislation as being, a discontinuance of a business by the old partners and a succession to that business by the old partners and the new partner, such a change is hereafter to be deemed to be such a discontinuance and succession. The words are, in our view, merely inserted ex majori cautela to make it clear that sub-r. 2 has nothing to do with the cases to which sub-r. 1 applies.

Some reliance seems also to have been placed upon the words which enact that in sub-r. 2 references to a person include references to a partnership: but that is in our view obviously directed to making it clear that where one partnership transfers business to another person, either an individual or a partnership, which consists of persons entirely different from those which constituted the transferring partnership, this sub-rule will operate. In other words, it is a reminder that as the singular includes the plural, the word "person" includes several persons in partnership. The sub-rule has already made it clear that the case where the business is carried on by a firm in which there is one partner who was also in the firm which theretofore carried it on, is wholly outside this sub-r. 1.

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We must mention a further argument, which found favour with the King's Bench Division but which we find ourselves unable to accept. It was said that unless r. 9 is construed so as to enable the assessment to be apportioned under its provisions in such a case as the present, where the parties do not avail themselves of their power to get a re-assessment under the proviso to sub-r. 1, there is a "casus omissus." We do not follow this argument. It is to be borne in mind that until 1880 there was no such provision as r. 9 in existence, and those concerned, whether in the case of a change of partners, or in the case of a transfer of the business from one owner to another, had to do without any such provision. In 1880 it was found desirable to set up this machinery, so as to adjust the rights between the Revenue and the successive owners of a transferred business. No machinery was, as we read the Act, set up to deal with the case of a change of partners, for the continuing partners would remain liable to the Revenue (as indeed, we imagine, would the retiring partners in respect of the current year), and the adjustment of the burden as between continuing and incoming partners would obviously in practice be a matter to be dealt with by the partners themselves, in accordance with their mutual partnership obligations. We are not impressed by the argument of "casus omissus" when the need to deal with the case was not apparent either from 1842 to 1880, or from 1880 until r. 11 was altered in 1926, or indeed, so far as we are aware, until this present litigation was started.

One final argument was that unless r. 9 is construed as the Revenue contend, there seems now to be no case to which r. 9 applies, and why, it is asked, was not r. 9 then repealed? That seems to us a very poor ground for giving an entirely unnatural meaning to reasonably plain words. It may be that the uselessness of r. 9 after the legislation of 1926 was overlooked: or it may be that the draftsman of the Act (as indeed the words already mentioned which refer in sub-r. 2 of r. 11 to sub-r. 1 suggest) may have misapprehended the meaning of r. 9. But in any case the fact that a provision which has become inoperative in practice is left unrepealed does not appear to us to assist in the construction of it.

For these reasons we find ourselves unable to agree with the judgment of the King's Bench Division. In our judgment the condition precedent to the operation of r. 9, namely, that a person has ceased to carry on a business and has been succeeded therein by another person, is not fulfilled by the circumstances of the case. It follows that the officer of the Revenue had no duty or right to give the certificate under r. 9, sub-r. 1 and the General Commissioners have no duty or right to adjust the assessment under r. 9, sub-r. 2. The appeal should, in our judgment, be allowed, and the order of prohibition asked for in the notice of motion should be made.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for appellants: *Janson, Cobb, Pearson & Co.*

Solicitor for Inspector of Taxes and City Commissioners: *Solicitor of Inland Revenue.*

A. W. G.

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ALLIGHAN AND ANOTHER *v.* LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY, LIMITED.

Moneylender—Contract—Note or memorandum—Bill of sale given as security—Schedule to bill of sale—No necessity for inclusion of schedule in note or memorandum—Moneylenders Act, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 6.

A sum of money was borrowed from a moneylender upon the security of a bill of sale. The note or memorandum of the contract included a copy of the bill of sale but did not include the schedule of the goods included in the bill of sale:—

Held, that it was not necessary for the schedule to the bill of sale to be included in the note or memorandum of the contract, and, therefore, the note or memorandum was not invalidated by a failure to comply with s. 6 of the Moneylenders Act, 1927.

ACTION tried before Singleton J. without a jury.

The defendants were a firm of moneylenders with whom the plaintiffs, Mr. Ernest George Allighan and his wife, had, between the years 1934 to 1939, entered into a number of moneylending transactions.

On March 5, 1937, there was a transaction in which a promissory note for 140*l.* was given by the plaintiffs, made up as to 108*l.* of the balance of a former transaction together with a cash advance of 32*l.* The interest was stated to be 25 per cent., amounting to 39*l.* 4*s.* On this transaction there was, according to the defendants' statement, on December 14, 1938, a balance due to the defendants of 43*l.* 10*s.*

On May 2, 1938, there was an advance of 130*l.* by the defendants to the male plaintiff, and the note or memorandum included a bill of sale which provided that the lenders should hold the goods included in it by way of security for the payment of the sum of 130*l.* and interest thereon. There was a covenant by the borrower to pay the principal sum and interest on August 2, 1938. But there was no provision to pay interest at 30 per cent. or at any other rate after August 2, 1938. The defendants, however, calculated the interest due on December 14, 1938, as the sum of 18*l.* 10*s.*, whereas on August 2, 1938, only 9*l.* 15*s.* was due in respect of interest. The defendants alleged that on December 14, 1938, there was a balance of 89*l.* 15*s.* due to them by the plaintiffs on this transaction.

On December 14, 1938, there was another moneylending transaction in which the balances owing on the two previous transactions were brought in, namely, a balance of 43*l.* 10*s.* due on the transaction of March 5, 1937, and a balance of 89*l.* 15*s.* alleged by the defendants to be due on the bill of sale of May 2, 1938, making a total of 133*l.* 5*s.* There was a cash advance of 6*l.* 15*s.*, making a total of 140*l.* Interest was charged at 25 per cent., which was said to amount to 39*l.* 4*s.* The total amount for which the promissory note was given was 179*l.* 4*s.*, repayable by monthly instalments of 7*l.* 9*s.* 4*d.*

On February 1, 1939, the plaintiffs borrowed 100*l.* from the defendants upon the security of a bill of sale. The rate of interest charged was 30 per cent. and repayment was to be by a lump sum on May 1, 1939. The note or memorandum of the contract included a copy of the bill of sale, but the schedule of the goods which were included in the bill of sale, and was annexed to the bill of sale, was not included in the note or memorandum. The borrower paid to the lenders the sum of 15*s.* 10*d.* in respect of stamping expenses.

Each of the transactions which the plaintiffs had with the defendants bore a certain number in the defendants' ledger account, and the defendants subsequently referred to the various transactions by its number in their ledger and not by the date of the transaction.

The plaintiffs claimed a declaration that the contracts dated December 14, 1938, and February 1, 1939, and all securities given in connection therewith were void and unenforceable by reason of non-compliance with the Bills of Sale Act Amendment Act, 1882, and/or the Moneylenders Acts, 1900 to 1927.

Harry Samuels for plaintiffs.

P. H. Thorold Rogers for defendants.

The arguments sufficiently appear from the judgment.

SINGLETON J. This is a case which is not free from

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difficulty. Indeed, no case under the Moneylenders Act, 1927, is without difficulty. It is comparatively seldom that disputes under the terms of the Act are contested in Court; in a large proportion of cases they are settled without coming into Court. It is not often that s. 6 of the Act has to be construed, and I dare say that most judges in this Division are grateful for that, because these cases are often somewhat complicated.

This action arises in these circumstances. The plaintiffs had a number of moneylending transactions with the defendant company, but on December 14, 1938, there were only two transactions outstanding. On December 14, 1938, these two transactions, in so far as they were outstanding were sought to be embraced in a new contract or arrangement which bore that date. Thereafter on February 1, 1939, there was another transaction bearing that date. In this action the plaintiffs seek relief in respect of these two last mentioned transactions dated December 14, 1938, and February 1, 1939.

Mr. Samuels, on behalf of the plaintiffs, raised several points in regard to the agreement of December 14, 1938. He submitted that the note or memorandum of that transaction was not a note or memorandum which complied with s. 6 of the Moneylenders Act, 1927 (1), for a number of reasons. In the first place, he said that the amount stated as the total amount advanced was not the sum of 140*l.* Secondly, he submitted that the document itself showed that it was a combination of two earlier transactions, in which the amounts previously advanced were 270*l.*, and merely referred to those transactions by two numbers, which are the numbers by which those transactions are designated in the defendants' books, and that designation was insufficient, in that it did not show the dates of those previous transactions, nor when they were required, nor for how long, and that there was no splitting up, so that the borrower did not know what his position under each individual transaction was. Thirdly, he submitted that the rate of interest was set out at 25 per cent., when it should have been another figure and should have been calculated on the basis of the Schedule to the Act. Indeed, he said that the interest was stated as a lump sum of 39*l.* 4*s.* and it being so stated a calculation on the basis of the Schedule to the Act would have shown that the rate of interest charged was 26·88 per cent., so that the note or memorandum was wrong in this respect, and he submitted that the interest charged was not stated, but only that there was a lump sum for interest.

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(1) Moneylenders Act, 1927, s. 6, sub-s. 1: "No contract for "the repayment by a borrower of "money lent to him or to any "agent on his behalf by a money-"lender after the commencement "of this Act or for the payment by "him of interest on money so lent "and no security given by the "borrower or by any such agent "as aforesaid in respect of any "such contract shall be enforce-"able, unless a note or memoran-"dum in writing of the contract be "made and signed personally by "the borrower, and unless a copy "thereof be delivered or sent to "the borrower within seven days "of the making of the contract; "and no such contract or security "shall be enforceable if it is proved "that the note or memorandum "aforesaid was not signed by the "borrower before the money was "lent or before the security was "given as the case may be."

Sub-s. 2: "The note or "memorandum aforesaid shall "contain all the terms of the "contract, and in particular shall "show the date on which the loan "is made, the amount of the "principal of the loan, and, either "the interest charged on the loan "expressed in terms of a rate per "cent. per annum, or the rate per "cent. per annum represented by "the interest charged as calculated "in accordance with the provisions "of the First Schedule to this Act."

To deal first with the last point taken by Mr. Samuels. In my view the interest charged on the loan is expressed in terms of a rate per cent. in the note or memorandum of December 14, 1938, in the words "Interest charged at the "rate of 25 per cent. per annum"; so that point fails.

The note or memorandum of the contract dated December 14, 1938, is by no means clear in its terms. On the face of it, it sets out that it is a combination of two previous transactions, the dates of which are not given. I do not regard that as a matter of moment, because it is clear from the correspondence which has taken place between the parties, that the male plaintiff knew that there were only two transactions outstanding, and he had himself referred to them by number, after the defendants had done so, and he was well aware what those transactions were. But in the way the two transactions are lumped together, and in the general form of this document where it is sought to embrace two old transactions I think it is far from clear, and I am satisfied that the defendants could devise something much clearer than this document, and something which could be much better understood by a borrower, who is for the purposes of this Act to be regarded as a needy borrower. When this document was explained to me by Mr. Samuels I thought that the explanation which he gave me was not very clear, and the explanation which Mr. Rogers gave of the document was quite different. That shows that the document does not make the matter clear of itself. The object of the note or memorandum mentioned in s. 6 of the Moneylenders Act, is to have something which the borrower can understand and from which he will gather what his liabilities are, and, if there had been an earlier transaction which is incorporated in the later one, what the result is. I do not think this document achieves that result. It may be that if the borrower was fortunate enough to have Mr. Thompson, the secretary of the defendant company, to explain to him precisely how these sums were arrived at, he might follow it. I am not, however, sure as to that, because I have had the explanations given to me by Mr. Samuels and by Mr. Rogers, and I am not sure that even Mr. Rogers reached quite the same conclusion in all respects as Mr. Thompson, the secretary of the defendant company, did, and if both learned counsel with the help of solicitors and advisers upon these matters cannot agree what the document means, how can a borrower know what it means ? The document in my opinion is not clear. I do not decide this case upon that matter only, but I desire to point out that, in my opinion, it is the duty of those who supply the note or memorandum of contract to the borrower to make the matter clear. It is not clear upon that document, and if the note or memorandum is insufficient it is immaterial, in my opinion, if there has been correspondence or even conversations as well in order to make it clear ; the result is that the note or memorandum does not comply with the statute.

Among the figures of the document of December 14, 1938, are the following : Amount previously advanced under the earlier transactions, 270*l.*, and the amount paid on account of principal is 136*l.* 15*s.* from which it appears that there is a balance of principal owing of 133*l.* 5*s.* The amount which is said to have been advanced on that occasion is 6*l.* 15*s.*, making the total amount of money advanced 140*l.*, and interest is charged at the rate of 25 per cent. per annum, which equals 39*l.* 4*s.*, and so the total amount said to be owing on the new loan is 179*l.* 4*s.* which is repayable by monthly instalments of 7*l.* 9*s.* 4*d.* The amount in the promissory note is 179*l.* 4*s.*, and forming part of the note or memorandum is a mortgage of an insurance policy on the life of Mr. Allighan, the plaintiff. The interest figures are shown as 56*l.* 18*s.*, which is made up of 38*l.* 8*s.*, the interest said to have accrued, and to have been paid, on the earlier transaction of March 5, 1937, and 18*l.* 10*s.*, which is said to be interest on an earlier transaction of May 2, 1938, when 130*l.* was borrowed and interest was charged at the rate of 30 per cent. per annum, repayment to be made in one sum on August 2, 1938. In that case the note or memorandum included a bill of sale which, in regard to the goods dealt with in it, provided that the lender should hold the same by way of security for the payment of the sum of 130*l.* and interest thereon at the rate of 30 per cent. per annum and " the said mortgagor doth further agree and declare that "he will duly pay to the said company the principal sum "aforesaid together with the interest then due on the 2nd "August next." Several lines are struck out of the printed form and that, as I read it, is a covenant, and, indeed, the note or memorandum shows it is a covenant, to pay the principal sum and interest on August 2, 1938, that is three months after the date of the borrowing. There is no provision anywhere for the payment of interest at 30 per cent. or at any other rate after August 2, 1938. Mr. Rogers argued that interest would continue to run at the same figure under the terms of the note or memorandum or covenant in the bill of sale. I asked him on what he based the covenant to pay interest after August 2, 1938, and he submitted that it was implied in law. After the adjournment he cited to me the case of *Cook* v. *Fowler* (1), from which it appears that if there is a covenant to pay

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(1) (1874) L. R. 7 H. L. 27.

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money upon a certain date with interest up to that date, you cannot imply a covenant to pay interest at the same rate after the date on which the principal sum fell due. It may be that if the principal sum is not paid upon that date, the lender who ought to have been paid on the due date may recover the equivalent of the interest as damages, but that is a matter for the Court. In these circumstances it seems to me that upon the agreement of May 2, 1938, and upon the covenant in the bill of sale of May 2, which is part of the note or memorandum of contract there is no provision for interest to be paid after August 2, 1938. When the defendant company, the lenders, were approached by the plaintiffs in December, 1938, for a further loan they calculated the interest as though it was running after August 2, 1938, and they then made out that upon the transaction of May 2, 1938, there remained due as at December 14, 1938, 89*l.* 15*s.*, and that on an earlier transaction on March 5, 1937, there was 43*l.* 10*s.* due. They added those two sums together to get the sum of 133*l.* 5*s.* which is the total amount said to be due on the two transactions, and they then added 6*l.* 15*s.*, the amount then advanced to make the round sum of 140*l.* There was not 18*l.* 10*s.* interest due upon the May transaction, but only 9*l.* 15*s.*, and in the result the amount of interest stated in the note or memorandum of December 14 as payable, and claimed as 18*l.* 10*s.* is too high; it ought to have been only 9*l.* 15*s.* That being so the balance due is wrongly stated, and the total amount said to be advanced is wrongly stated. If that is right, Mr. Rogers very fairly admitted that he could not say that the note or memorandum was a note or memorandum which complied with s. 6 of the Moneylenders Act, 1927, because it did not accurately set out that which was the arrangement between the parties. He argued, at one time, that the defendants were entitled to say that the correspondence showed and the evidence of Mr. Thompson showed that the transaction had been explained to the borrower, and that the borrower agreed that these sums were due by him, but I cannot find that it was ever explained to the borrower that there was any question whether or not that interest was payable or that the lenders might have a right to claim damages in respect of the non-payment of the principal on the due date, nor can it be said that there was any agreement by him that the damages were to be the difference between 9*l*. 15*s*. and 18*l*. 10*s*. I do not think there was. So that entirely apart from the lack of clarity in the note or memorandum of December 14, 1938, I think the fact that the figures are wrongly stated in the note or memorandum is sufficient to make that note or memorandum one that does not comply with the requirements of s. 6 of the Act. Indeed, as regards figures, Mr. Rogers very frankly says that it is not a note or memorandum within that section, and in my view the plaintiffs are entitled to succeed on that document. I do not attach importance to the fact that the borrower was not informed of the precise dates of the transactions, and it is not necessary for me to go further into the matter than to say that, for the reasons I have given, the plaintiffs are entitled to relief in respect of that transaction of December 14, 1938.

I come now to the document relating to the later transaction of February 1, 1939, when the plaintiffs borrowed 100*l*. from the defendants, the rate of interest charged being 30 per cent. and the repayment was to be by a lump sum on May 1, 1939. Mr. Samuels, on behalf of the plaintiffs, raised three questions upon this transaction, two of them relating to the note or memorandum. His first submission is that there was between the parties an agreement as to the payment of the stamping expenses, which were to be paid by the plaintiffs, but that there is no mention of that agreement in the note or memorandum; in fact 15*s*. 10*d*. was paid on the day of the transaction and he contended that that payment was part of the contract, and ought to have been stated in the note or memorandum. That is based on a letter dated January 13, 1939, from Mr. Thompson, the secretary of the defendant company, to Mr. Allighan; the last sentence of this letter is as follows: "The stamp duties, etc., upon the new document "will amount to 15*s*. 10*d*." Mr. Rogers, on behalf of the defendants, submitted that there was no reason whatever for the mention of that 15*s*. 10*d*. in the note or memorandum of contract, and I think he is right. In the first place the letter of January 13 does no more than draw the attention of the borrower to the fact that the stamp duty will be so much; they do not call upon the borrower to pay that amount. There is no evidence before me that the borrower was asked to pay that amount or that he paid it as part of the contract between the parties. Mr. Thompson, the secretary of the defendant company, told me that it was not a part of the contract, but the borrower had been warned what the amount of it was, and that it was not until after they had given the borrower the cheque for the total amount which he was borrowing, that the borrower thereafter paid the amount of the stamp duties by another cheque. It is true that that might be "paying" in a sense, and it may have been part of the bargain, but there was no proof whatever before me to show that it was so. The male plaintiff was not called before me; in fact, neither of the plaintiffs were called as witnesses before me. However, entirely apart from that, Mr. Rogers referred me to the case of *Wales* v. *Carr* (1) which decided that "A mortgagee's solicitor's costs of negotiating the loan and "preparing the mortgage deed become, on completion of the "transaction, a simple contract debt at common law due to "the mortgagee by the mortgagor; and cannot be added by "the mortgagee to his security as part of the costs, charges "and expenses properly incurred under or by virtue of his "mortgage." So I think it may be said in a case such as this either that the stamp duty and expenses of that kind become a simple contract debt to the mortgagee by the mortgagor, that is to the lender by the borrower, or that it was well understood by the borrower that if he, the borrower, did get this further loan he, the borrower, would pay the stamp duties, etc., and Mr. Thompson told me what those costs were, amounting in all to 15*s*. 10*d*.

In any event the plaintiffs fail upon this point, as they have not shown me that there was any contract or any term of the contract which ought to have been put in the note or memorandum. They fail entirely upon that. Moreover I was told by Mr. Rogers that Lewis J. in the case of *Steward-Nealor* v. *London and Westminster Loan and Discount Co., Ld.* (1), gave a judgment upon this point, and that his view was the same as that at which I have arrived. I need hardly say that I am only too glad to follow that decision of Lewis J.

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(1) [1902] 1 Ch. 860.

Mr. Samuels' second point upon the note or memorandum of February 1, 1939, is that the goods which are comprised in the bill of sale, which is part of the note or memorandum, are not entered upon the copy of the bill of sale which is annexed to the note or memorandum, as the copy bill of sale does not include any schedule. The bill of sale itself did include a schedule of certain contents of the flat, which were subject to the bill of sale of February 1, 1939, and Mr. Samuels submitted that as the copy bill of sale supplied as part of the note or memorandum did not include the schedule, the plaintiffs did not have supplied to them a complete note or memorandum, and they did not know, indeed, which of their goods might be seized. At first that argument attracted me, and knowing as I do that the Courts interpret the terms of s. 6 of the Moneylenders Act, 1927, strictly, I thought for a time that this was a failure to state in the note or memorandum all the terms of the contract. But Mr. Rogers referred me to the decision of the Court of Appeal in the case of *Reading Trust, Ld.* v. *Spero* (2), and in particular to the words of Scrutton L.J. (3), and also to a decision of Macnaghten J. in the case of *Lawrence, Ld.* v. *Crowder.* (4) In that case Macnaghten J. on facts similar to those in the present case, held that it was unnecessary to set out in the note or memorandum the schedule to the bill of sale. Scrutton L.J. in *Reading Trust, Ld.* v. *Spero* said (2): "It "seems clear in s. 6 that the Legislature, while requiring a "copy of the contract to be signed, has not required a copy "of the security to be sent to the borrower, and it may need "consideration whether if there is a more onerous term in the "security than in the contract, the note of the contract may "not be incomplete. I am disposed to think that where the

(1) Dec. 20, 1937, unreported.
(2) [1930] 1 K. B. 492.
(3) [1930] 1 K. B. 505.
(4) July 28, 1938, unreported.

"contract contemplates a promissory note as security and "there is a promissory note in the ordinary form, not con"tradicting the contract, the fact that the contract does not "set out the terms of the promissory note will not invalidate "the contract. It may be otherwise if the security contains "an onerous term not in the contract. I reserve, however, "any final decision on this question which does not seem to "me to arise in the present case."

Now, I assume that it is necessary to set out the terms of the security if the security contains an onerous term not in the contract, but if the note or memorandum includes a copy of the security itself, and if the borrower is told in that copy of the right of procedure as regards all and singular the articles named in the schedule, I cannot see that it is necessary for the protection of the borrower to mention in the note or memorandum every stick and every pan set out in the schedule to the bill of sale, or that it should be necessary to set out again that schedule in the copy of the note or memorandum. That is the result at which Macnaghten J. arrived in the case to which I was referred. It seems to me to be putting an undue burden on a lender, and I think it is right in those circumstances to follow the decision of Macnaghten J. on facts which I am told, on this part of the case, were just the same as these.

The other point raised by Mr. Samuels was that, apart from any question under the Moneylenders Act, the bill of sale itself of February, 1939, was void in that it did not disclose the true consideration. The reason for that submission was that there was no mention of the 15*s*. 10*d*. in respect of the stamp duties, etc. I think that point must fail. The true consideration was stated and the fact that the stamp duties were going to be paid in the ordinary way and according to the usual custom by the borrower does not, in my opinion, mean that the 15*s*. 10*d*. was part of the consideration, and that point fails.

That I think is sufficient to dispose of the matters raised before me. It follows that the plaintiffs are entitled to judgment and to a declaration that the contract dated December 14, 1938, is void and unenforceable and for a return of the security given in connection with that contract. That is all I think they are entitled to. Their claim fails in regard to the transaction of February, 1939.

Judgment accordingly.

Solicitors for plaintiffs: *Arthur Dollond & Co.*
Solicitors for defendants: *Arthur Pyke & Co.*

R. F. S.

1940
Sept. 3, 4, 5.

WOOD *v.* LONDON COUNTY COUNCIL.

Factory Acts—" Factory "—Kitchen—Premises belonging to public authority—Preparation of food for patients and staff at hospital—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151, *sub-ss.* 1, *paras.* (*a*), (*b*), 9.

While the plaintiff, a kitchen-maid employed by the defendants, a public authority, was mincing, with an electrically operated mincing machine, meat in the kitchen of a hospital belonging to the defendants, the minced meat being intended for consumption on the premises by the patients at and/or the staff of the hospital, her hand was caught in the machine and she was injured :—

Held, that the kitchen was a " factory " within s. 151, sub-s. 1, of the Factories Act, 1937, so that the defendants must, by s. 14 of the Act, securely fence any dangerous machinery therein.

The effect of sub-s. 9 of s. 151 of the Act is that, whereas, in a normal case, by s. 151, sub-s. 1, for premises to be a " factory " within the Act the work carried on thereat must be carried on by way of trade or for purposes of gain, where the premises belong to or are in the occupation of a public authority it is not necessary that the work carried on thereat should be so carried on.

Action tried by Tucker J., without a jury.

In September, 1939, the plaintiff, Marjory Wood, was a kitchen-maid employed by the defendants, the London County Council, at Bexley Mental Hospital, which belonged to them. While she was mincing corned beef with an electrically operated mincing machine in the kitchen of the hospital, her hand was caught in the machine and she was seriously injured. The minced meat was intended, not for sale, but for consumption on the premises by the patients at and/or the staff of the hospital. The plaintiff brought this action, in which she alleged that her injury was due to the negligence of the defendants or their servants, or, alternatively, to the breach by them of the duty laid on them by s. 14 of the Factories Act, 1937, to fence the machine, it being " dangerous machinery " within that section, and the kitchen being a " factory " within s. 151, sub-s. 1, of the Act. (1) The defendants denied that they had been guilty of negligence or of breach of statutory duty, and they further pleaded that the plaintiff had been guilty of contributory negligence.

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(1) By Factories Act, 1937, s. 151, sub-s. 1 : " Subject to the " provisions of this section, the " expression ' factory ' means any " premises in which . . . . persons " are employed in manual labour " in any process for or incidental " to any of the following purposes,

Paley Scott K.C. and *Edgedale* for plaintiff.

Tristram Beresford K.C. and *Monier-Williams* for defendants. The defendants cannot be guilty of any breach of the Factories Act, 1937, because the kitchen in question here is not a factory within s. 151, sub-s. 1, of the Act. The mincing of meat does not constitute the making of an article within para. (*a*) of the sub-section, nor can " meat " be described as an article so that the mincing of it is the altering of an article within para. (*b*). The Factory Acts are intended to apply to " places "in the nature of manufactories " : *Nash* v. *Hollinshead*, per Collins L.J. (1) ; and a kitchen where food is prepared for consumption on the premises is not such a place. Sub-sect. 9 of s. 151 must be read with some limitation. It is intended to bring within the Act premises belonging to or in the occupation of a public authority which would otherwise be outside it because the work carried on thereat was not carried on by way of trade or for purposes of gain, e.g., printing works where notices and other municipal publications are printed by employees of the public authority. But the sub-section does not bring within the Act premises such as a kitchen which, if contained in a private house, would not be a factory, the work carried on thereat not being carried on by way of trade or for purposes of gain, merely because those premises belong to or are in the occupation of a public authority.

Paley Scott for plaintiff. The mincing of meat for sale to the public in jars or tins would clearly be the making of an article

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" namely :—(*a*) the making of any " article or of part of any article ; " or (*b*) the altering . . . . of any " article . . . . being premises in " which . . . . the work is carried " on by way of trade or for pur- " poses of gain and to or over " which the employer of the "persons employed therein has the "right of access or control . . . . "

By sub-s. 9 : " Any premises "belonging to or in the occupation "of . . . . any municipal or other "public authority shall not be " deemed not to be a factory " . . . . by reason only that the " work carried on thereat is not " carried on by way of trade or " for purposes of gain."

(1) [1901] 1 Q. B. 700, 706.

within s. 151, sub-s. 1, para. (*a*), of the Act and the premises on which that operation took place would be a "factory." The fact that the meat is minced for consumption of the mince on the premises does not alter that position if the mincing is by way of trade or for purposes of gain. The effect of sub-s. 9 of the section is to bring within the Act premises belonging to or in the occupation of a public authority where such a process is carried on although it is not carried on by way of trade or for purposes of gain. The mincing of meat is the making of an article, namely, minced meat, within para. (*a*) of sub-s. 1, or the altering of an article, namely, the unminced meat, within para. (*b*). These premises were, therefore, a "factory." This was a dangerous machine. It was not securely fenced, and the defendants, therefore, were guilty of a breach of their duty under s. 14 of the Act, so that the plaintiff is entitled to recover.

TUCKER J. The plaintiff alleges that the kitchen maintained by the defendants at this hospital is a "factory" within s. 151, sub-s. 1, of the Factories Act, 1937; that the mincing machine was dangerous machinery within s. 14 of the Act and was not securely fenced as dangerous machinery must be by that sub-section; and that, therefore, the defendants were guilty of a breach of the duty imposed on them by the statute.

The effect of sub-s. 9 of s. 151 appears to me to be that, whereas, in a normal case, for premises to be a "factory" within the Act it is essential that the work carried on thereat is carried on by way of trade or for purposes of gain, where the premises belong to or are in the occupation of a public authority it is not necessary that the work carried on thereat is carried on by way of trade or for purposes of gain. Therefore, to determine whether premises which belong to or are in the occupation of a public authority constitute a "factory" reference must be made to the first part of sub-s. 1 of the section.

I have to ascertain whether the premises in question in the present case are "premises in which . . . . persons are employed in manual labour in any process for or incidental to . . . . (*a*) the making of any article . . . . or (*b*) the altering . . . . of any article . . . ." I omit para. (*c*) of the sub-section because it does not apply here. It has been argued for the London County Council that corned beef is not an "article" which can be altered so as to bring the case within para. (*b*) and that it is not apt to describe the process of mincing corned beef as the "making" of an "article" so as to bring the case within para. (*a*). I can see no reason why slices or tins of corned beef should not be an "article" within the meaning of the sub-section, and, in my view, the mincing of meat clearly results in an "altering" of the article put into the mincer. Therefore, if I am right in holding that the effect of sub-s. 9 is simply to eliminate the requirement that work carried on at premises belonging to or in the occupation of a public authority must be carried on by way of trade or for purposes of gain, the effect of sub-s. 1 is that the kitchen of this institution, which caters for some two thousand patients and for some three hundred members of the staff, is a "factory" within the Act.

Mr. Beresford has contended that some qualification must be put on sub-s. 9, that its object is to bring within the Act activities, such as printing, which are usually carried on by way of trade and for purposes of gain, when they are carried on by a public authority as part of the work they do without profit, and that the sub-section does not apply to such an operation as preparing food in a kitchen which is normally a domestic matter not carried on by way of trade or for purposes of gain. In my view, however, the preparation of food in a kitchen may often be carried on by way of trade or for purposes of gain quite apart from preparing articles of food for sale over the counter of a retail shop, and, consequently, the premises on which such operations are carried on for such purposes come within s. 151, sub-s. 1. In any case, I feel unable to place any interpretation on sub-s. 9 other than that which I have indicated. In my opinion, this kitchen comes within the definition of "factory," however unreal that may appear.

[His Lordship found as a fact that the machine was dangerous and that it was not securely fenced as required by s. 14 of the Act. He also, however, found that the plaintiff had been guilty of contributory negligence, and he, therefore, entered judgment for the defendants.]

Judgment for defendants.

Solicitor for plaintiff : *W. H. Thompson.*
Solicitor for defendants : *J. R. Howard Roberts.*

G. F. L. B.

COLLIER v. SUNDAY REFEREE PUBLISHING COMPANY, LIMITED.

1940
June 12, 13;
Aug. 9.

Master and servant—Contract of service—Sale by master of business—Inability to employ servant further—Breach of contract.

During the continuance of a contract by which the plaintiff was employed by the defendants to act as the chief sub-editor of a newspaper owned by them, the defendants sold the newspaper and thus put it out of their power further to employ the plaintiff. For some months the defendants continued to pay the plaintiff weekly sums equal in amount to his salary, and the plaintiff accepted those sums as being on account of the damages to which, he contended, he was entitled for the defendants' breach of contract, but he did no work for the defendants save that at their request and as a matter of courtesy on his part he attended on certain days at their office and rendered, or held himself ready to render, certain services. The plaintiff having refused to do this any longer, the defendants stopped the weekly payments. In an action by the plaintiff against the defendants for wrongful dismissal:—

Held, that when the defendants sold the newspaper they destroyed the position to which they had appointed the plaintiff and thereby committed a breach of contract for which they were liable to pay him damages amounting to the sums payable to him under the contract, less any remuneration earned by him in employment by third parties after the breach.

ACTION.

By a contract in writing dated July 3, 1937, and made between the plaintiff, a journalist, and the defendants, proprietors of a newspaper named the Sunday Referee, it was agreed that the plaintiff should be employed by the defendants as chief sub-editor of that newspaper for a year from September 1, 1937, at a salary of thirteen guineas a week. By a contract made orally between the plaintiff and the defendants on August 18, 1938, and confirmed by letters dated August 19 and 23, 1938, passing between the parties, it was agreed that the plaintiff's employment should be renewed for two years from September 1, 1938, and that the defendants should pay to the plaintiff as salary sixteen guineas a week from September 1, 1938, to August 31, 1939, and seventeen guineas a week from September 1, 1939, to August 31, 1940.

On June 11, 1939, the defendants sold the Sunday Referee to purchasers who did not take over the plaintiff as chief sub-editor, and the publication of the newspaper thereupon ceased. From this time until November 1, 1939, the defendants continued to pay to the plaintiff weekly sums equal in amount to his salary. The plaintiff accepted these sums as being on account of the damages to which, he contended, he was entitled for the defendants' breach of contract, but he did no work for the defendants, save that at their request and as a matter of courtesy on his part he attended on certain days at their office and rendered, or held himself ready to render, certain services. On November 1, 1939, however, he refused to do this any longer, and the defendants stopped the weekly payments.

The plaintiff thereupon brought this action for damages for breach of contract. He alleged that the defendants, by selling the newspaper, had made it impossible for themselves to continue to employ him as chief sub-editor of the newspaper as they were bound to do under the contract between them, that they had repudiated that contract, and that they had wrongfully dismissed him from his employment.

The defendants denied the plaintiff's allegations. Alternatively (inter alia), they pleaded that, if there were a breach of contract, the plaintiff had waived it and/or was estopped from alleging it owing to the fact that between June 11 and November 1, 1939, he accepted from the defendants his salary under the contract.

D. A. Scott Cairns for plaintiff. The plaintiff is entitled to recover because, where the basis of a contract is voluntarily destroyed by one of the parties to it, that party is guilty of a breach of the contract: *Driscoll* v. *Australian Royal Mail Steam Navigation Co.* (1); *Turner* v. *Goldsmith.* (2) The cessation of the publication of the newspaper by the defendants operated as a wrongful dismissal of the plaintiff as did the dissolution of partnership in *Brace* v. *Calder.* (3) Both *Lagerwall* v. *Wilkinson, Henderson & Clarke, Ld.* (4), and

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(1) (1859) 1 F. & F. 458.
(2) [1891] 1 Q. B. 545.
(3) [1895] 2 Q. B. 253.
(4) (1899) 80 L. T. 55.

Turner v. *Sawdon & Co.* (1) are distinguishable, because in neither case was there any destruction by the employers of their business and the point was whether the employers were bound to employ, as well as to pay, the servant. In any case, it has been recognized that *Turner* v. *Sawdon & Co.* (1) is not of universal application: *In re Rubel Bronze and Metal Co. and Vos*, per McCardie J. (2) On the amount of damages which should be awarded, in the world of newspapers there is a degree of publicity about the movements of those engaged in it akin to that attaching to the stage, and the plaintiff is entitled to damages for the defendants' failure to employ him: *Herbert Clayton & Jack Waller, Ld.* v. *Oliver* (3); *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* (4) After June 11, 1939, the plaintiff was entitled to treat the contract as at an end.

B. J. M. MacKenna for defendants. The defendants are not liable. The only obligation on them was to pay the plaintiff his salary: *Lagerwall* v. *Wilkinson, Henderson & Clarke, Ld.* (5); *Turner* v. *Sawdon & Co.* (1); *Midland Counties District Bank, Ld.* v. *Attwood*, per Warrington J. (6) That the defendants were always prepared to do, and did, but in consideration of that the plaintiff was bound to obey their reasonable orders, e.g., to attend at any reasonable place and do any suitable work which was forthcoming. That he refused to do and so he himself repudiated the contract. The plaintiff is not entitled to damages under the principles of *Herbert Clayton & Jack Waller, Ld.* v. *Oliver* (3) and *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* (4), because his employment by the defendants was wholly different in its nature and its implications. *Brace* v. *Calder* (7) is distinguishable because there two out of four members of the partnership were unwilling to continue to pay the plaintiff his contractual salary and because the partnership ceased to exist whereas in the present case the company continued.

Cur. adv. vult.

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(1) [1901] 2 K. B. 653.
(2) [1918] 1 K. B. 315, 324.
(3) [1930] A. C. 209.
(4) [1928] 1 K. B. 269.
(5) 80 L. T. 55.
(6) [1905] 1 Ch. 357, 362.
(7) [1895] 2 Q. B. 253.

1940. Aug. 9. ASQUITH J. read a judgment in which, after stating the facts, he continued: The plaintiff argues that by ceasing to publish the Sunday Referee the defendants disabled themselves from performing further their contractual obligation, which was to employ him as chief sub-editor of that newspaper. The defendants contend that they were not bound to provide the plaintiff with work, but merely to continue to pay his salary, retaining the right to call on him to do work for them; that they did continue to pay his salary until November, 1939, but that at that time the plaintiff finally repudiated his alleged obligation to work for them when required so to do; and that the contract of service, alive until then, was terminated by such repudiation, and with it went any obligation on their part to pay further salary.

It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out. In some exceptional cases there is an obligation to provide work. For instance, where the servant is remunerated by commission, or where (as in the case of an actor or singer) the servant bargains, among other things, for publicity, and the master, by withholding work, also withholds the stipulated publicity: see, for instance, *Marbe* v. *George Edwardes (Daly's Theatre), Ld.* (1); but such cases are anomalous, and the normal rule is illustrated by authorities such as *Lagerwall* v. *Wilkinson, Henderson & Clarke, Ld.* (2) and *Turner* v. *Sawdon & Co.* (3), where the plaintiffs (a commercial traveller and a salesman respectively, retained for a fixed period and remunerated by salary) were held to have no legal complaint so long as the salary continued to be paid, notwithstanding that owing to their employers' action they were left with nothing to do. The employers were not bound to supply work to enable the employee, as the phrase goes, to "keep his hand in," or to avoid the reproach of idleness, or even to make a profit out of a travelling allowance. In such a case there is no breach of contract, but the result is much the same as if there had been, because in either event the plaintiff is entitled to a sum or sums which are measured prima facie by the amount of salary in respect of the unexpired period of service.

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(1) [1928] 1 K. B. 269.
(2) 80 L. T. 55.
(3) [1901] 2 K. B. 653.

I do not hold that in the present case there was in the contract of employment an implied stipulation for publicity and an obligation to provide work for the purpose of providing publicity. But I do hold that the very foundation of the contract was the appointment of the plaintiff, during the contract period, to a specific office. The defendants engaged the plaintiff, not to perform at large the sort of work commonly performed by any chief sub-editor. They engaged him to fill the office of chief sub-editor of a specific Sunday newspaper. By selling that newspaper they destroyed the office to which they had appointed him. That this is a breach of contract, I cannot doubt. The case somewhat resembles *Driscoll* v. *Australian Royal Mail Steam Navagation Company* (1), where the defendants contracted to employ the plaintiff in a particular ship of theirs and then sold the ship, whereby the plaintiff lost the employment. He was held to have a clear cause of action. So here, the sale of the newspaper on June 11, 1939, operated, in my view, as an improper dismissal of the plaintiff and can be treated by the plaintiff as such unless by some subsequent action he has precluded himself from availing himself of it.

The defendants alleged that the plaintiff had so precluded himself because he continued until November 1, 1939, to accept weekly sums equal in amount to his contractual salary and often tendered to him under the designation of "salary." Alternatively, the defendants say that a substituted agreement was arrived at by certain letters passing between the parties in June, 1939, under which the plaintiff, while retaining the right to salary, was bound to continue to render the defendants such services as they might reasonably require him to do; that he received his salary until November 1, but that on

(1) 1 F. & F. 458.

that date he finally repudiated the obligation to do any work for the defendants and thereby ceased to be entitled to any payments after that date. Lastly, the defendants say that, if the letters relied on do not contain such a substituted agreement, yet it is to be spelt out from the proposals for such an agreement contained in the letters, plus the plaintiff's subsequent acceptance of sums tendered as salary, which is relied on as an acceptance by conduct of the proposals in question.

Taking these grounds of defence a little out of their order, I hold, first, that the letters, taken by themselves, do not contain any substituted agreement. An essential term in the defendants' proposals was the right of the defendants to require the plaintiff to work for them, and this right the plaintiff categorically and repeatedly refused to concede, in particular by his letters of June 16 and July 3 and 7.

There remains the question whether the plaintiff's conduct in accepting the weekly payments from June to November 1 operates either as waiving the breach of the original agreement or as precluding the plaintiff from relying thereon, or, alternatively, operates as an acceptance of the proposals for a substituted agreement. I hold that the conduct relied on does not operate in either of these ways. The plaintiff's attitude is consistent throughout. He is saying: "You have "wrongfully dismissed me and the agreement is at an end. "I am not bound to do any work for you at all and I am "entitled to damages, the amount of which is measured, "prima facie, subject to mitigation, by the salary of which "you have deprived me. Any sums that you pay me will be "accepted on account of the damages you owe me." If the plaintiff had not been entitled to the sums which he accepted as damages, but could only be entitled to those sums as salary under the original or some substituted agreement, then a different inference might be drawn from his acceptance of them, but as he was, in my judgment, entitled to those sums, anyhow, as damages, no such inference can, in my view, be drawn.

For these reasons, I hold that the plaintiff is entitled to damages in respect of the period from November 1, 1939, onwards. I find that he used all reasonable diligence in mitigating damage by trying to find other work. He obtained no alternative employment until May 24, 1940, when he was engaged by the British Broadcasting Corporation in monitoring work, at a salary of 405*l.* a year, which is, I think, 7*l.* 16*s.* a week. The job was a temporary one of a maximum duration of six months, but subject to a week's notice within that period. As to the period, November 1, 1939, to May 24, 1940, he is, accordingly, entitled to damages at the rate of 17 guineas a week, and as to the period from May 24, 1940, to August 31, 1940 (when the broken contract would have expired), he is entitled to damages at the rate of 17 guineas a week minus 7*l.* 16*s.* a week—that is, to 10*l.* 1*s.* per week.

Judgment for plaintiff.

Solicitors for plaintiff : *Dehn & Lauderdale.*
Solicitors for defendants : *Lawrance, Messer & Co.*

G. F. L. B.

C. A.
1940
Aug. 21.

FRIIS *v.* PARAMOUNT BAGWASH COMPANY, LIMITED (No. 2).

County court—Practice—Costs—Interlocutory order silent as to costs—Costs in the cause—County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 100.

Where an interlocutory order in a county court action is silent as to costs, the party obtaining the order, if successful in the action, is entitled to the costs of obtaining the order as part of the costs in the cause, but the party unsuccessfully opposing the order, though successful in the action, is not so entitled.

The practice of the High Court adopted under s. 100 of the County Courts Act, 1934.

APPEAL from Woolwich County Court.

The appellant, Eric Friis, an incorporated accountant trading as Shaw, de Freece & Co., claimed 40*l.* 11*s.* 3*d.* from the defendant company for services rendered as accountant and secretary up to September, 1938. Commenced on November 15, 1938, in the High Court, the action was remitted to the Woolwich County Court. On May 3, 1939, the county court judge, on the defendants' application, made an order that the examination of one Leonard Ambrose, a witness for the defendants, should be taken on commission, nothing being said by the judge about the costs. The examination was duly held. On July 5, 1939, the action came on for trial, and was adjourned to October 11, 1939, when, on the plaintiff's application it was again adjourned, costs thrown away to be the defendants' in any event. The judge further ordered that the plaintiff should bring 10*l.* into court within fourteen days as security for the costs of the adjournment. On failure to so bring the money into court, the action was to be dismissed with costs. The plaintiff decided not to and did not pay the money in, with the result that the action stood dismissed with costs. On November 17, 1939, the defendants applied to the county court judge for an order dealing with the outstanding costs. The judge made an order that (inter alia) the whole of the costs of the said examination should be allowed, but the Court of Appeal held (1) that the order of October 11, 1939, constituted a final judgment, and that, consequently, the judge

(1) [1940] 1 K. B. 611.

had no jurisdiction to make the order appealed against, and also that it was unnecessary.

In due course the defendants' solicitors, consequent on the order of October 11, 1939, carried in their bill of costs in the action for taxation by the registrar, claiming (inter alia) the costs of the above examination, but the registrar, following what was said to be the usual county court practice of not allowing the costs of an interlocutory application in the absence of an order by the judge, refused to allow them. On a review of the taxation by the judge on July 1, 1940, he reversed the decision of the registrar, and directed him to allow these costs.

The plaintiff appealed. The appeal was heard on August 21, 1940.

C. R. Havers K.C. and *E. M. Hoy* for the appellant. The short point here is whether, where a county court judge has dismissed an action with costs, the costs of an interlocutory order obtained by the successful party in the action where the judge has not dealt with them, are to be included in the costs of the successful party in the action as costs in the cause. The practice of the county courts is not to allow them—see County Courts Practice for 1940, p. 2475, para. 6—and the registrar in the present case followed that practice. The county court judge, in reversing the registrar's decision, founded his judgment on *Friis* v. *Paramount Bagwash Co., Ld.* (1), where Slesser L.J. said: "If [the county court "judge] awards [a successful defendant] costs, it must, in our "opinion, follow that the defendant is entitled to all the costs "to which he has been put . . . . by reason of the plaintiff "bringing an action against him which has failed." But that case does not decide the present point. In the High Court these costs, no doubt, would be allowed—see Rules of the Supreme Court, 1940, p. 1482, citing a memorandum of Leach V.-C. in 1823. (2) Sect. 164 of the County Courts Act, 1888, which provided for the adoption by the county court of the High Court practice in the absence of any express provision, was

(1) [1940] 1 K. B. 611, 616.

(2) 1 Sim. & St. 357.

repealed by s. 193, sub-s. 4, and Sch. V. to the County Courts Act, 1934, and replaced by s. 100 of the latter Act to the same effect. But the practice of county courts followed here has existed for many years and has never been held to be wrong.

Astell Burt for the respondents was not called upon to argue.

Luxmoore L.J. This is an appeal from His Honour Judge Bensley Wells, sitting at Woolwich County Court, with regard to a review of taxation by him, in which he reversed an order made by the registrar. The subject-matter of the question we have to decide is the costs incurred in an interlocutory application to the county court by the defendants for the examination before an examiner of a witness for the defence, which application was granted, nothing being said in the order about costs. The witness was then examined and items of costs were incurred as a result. On October 11, 1939, the judge made an order dismissing the plaintiff's claim with costs. Subsequently application was made to the judge with regard (inter alia) to the costs of the above application for the examination before the examiner, which the defendants were anxious to include in the taxation and which they contended they were entitled to be paid. The judge granted the application and made the order, but this Court decided that he had no jurisdiction to make it (1) as the first order giving the defendant costs was a final order, and said, further, that the order applied for was unnecessary. The matter then came up before the registrar on taxation of the costs of the action, and he, following what was stated to be the general practice of registrars, held that he had no jurisdiction to allow these items, as being the costs of an interlocutory order made by the judge who made no special order dealing with the costs of the application. On a review by the judge he reversed the order of the registrar and held that this item was properly included in the bill. From that decision the plaintiff appeals, and the sole question we have to decide is whether the judge's decision was correct.

There is no doubt that the costs of the application for the

(1) *Friis* v. *Paramount Bagwash Co., Ld.* [1940] 1 K. B. 611.

examination and of the examination under it were proceedings in the county court and interlocutory matters, and by Order XLVII., r. 1, of the County Court Rules the costs of such proceedings in a county court are in the discretion of the court. But it is said on behalf of the plaintiff that as the order for the examination is silent as to costs, the county court judge has not exercised his discretion and therefore that these items are not payable to the successful defendants in the action according to the established practice in county courts.

In the High Court it is well settled that the costs of an interlocutory application are dealt with according to a rule laid down in 1823 (1), namely, that where the order is silent as to costs the party who is successful in the action is entitled to those costs as costs in the cause, while the party opposing is not. By s. 100 of the County Courts Act, 1934 (24 & 25 Geo. 5, c. 53): "In any case not expressly provided for by or in pursuance of "this Act, the general principles of practice in the High Court "may be adopted and applied to proceedings in a county "court." There is no express provision dealing with the costs of an interlocutory application where such costs were not dealt with at the time of the application. Of course, if the judge does then deal with them he has exercised the discretion given him by county court Order XLVII., r. 1. But if he has not, then I think that s. 100 of the Act of 1934 applies. The county court judge did not exercise his discretion, therefore the ordinary High Court rule applies, and the successful defendants, who were given the general costs of the action, are plainly entitled to these costs. They are costs which naturally flow from the making of the order for the examination which was on an interlocutory application. I think the county court judge was right, and that the appeal should be dismissed.

Scott L.J. I agree.

du Parcq L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Morris & Son.*
Solicitors for respondents: *Wedlake, Letts & Birds.*

W. L. L. B.

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(1) 1 Sim. & St. 357.

C. A.
1940
Aug. 13, 14.

WILLIAMSON *v.* JOHN I. THORNYCROFT AND COMPANY, LIMITED.

Negligence—Fatal accident—Claim by widow—Death of widow before trial—Assessment of damages.

A naval officer was killed on the trial trip of a vessel built by the defendants by an escape of carbon monoxide gas. His widow brought an action against the builders of the vessel claiming damages on behalf of herself and an infant child under Lord Campbell's Act, and under the Law Reform (Miscellaneous Provisions) Act, 1934. She died before trial, and her executors were substituted as plaintiffs. Singleton J. found that the defendants were negligent. Holding that in assessing damages he should have regard to the position at the date of the husband's death and should ignore the fact of the widow's death before trial, he awarded 3400*l.* under Lord Campbell's Act and 750*l.* under the Law Reform (Miscellaneous Provisions) Act, the latter sum being set off in the usual way:—

Held, by the Court of Appeal, that while the damages had to be assessed as at the date of the husband's death, the Court was entitled to inform its mind of subsequent events throwing light upon the realities of the case, such as the fact that one dependant had only had a short tenure of life before her dependence was brought to an end, and that, therefore, in this case only a comparatively small sum ought to have been allowed to the widow under Lord Campbell's Act. But—

Held, further, that the total amount awarded was not excessive and since the infant son was in the same position by reason of his mother's will as he would have been if the award had been made in his favour directly against the defendants, and since there was no cross-appeal, no cause had been shown to justify the interference of the Court with the amount of the award, and the appeal should be dismissed.

Appeal from Singleton J.

Lieut. Williamson, R.N., was appointed by the Admiralty to command a naval vessel under construction by the defendants, John I. Thornycroft & Co., Ld., and not yet taken over by the Admiralty. During the vessel's trials, Lieut. Williamson was killed by an escape of carbon monoxide gas. His widow brought an action against the defendants, on behalf of herself and her infant son, claiming damages under Lord Campbell's Act, and under the Law Reform (Miscellaneous Provisions) Act, 1934. Mrs. Williamson died about fourteen months after her husband, before trial, and her executors were substituted as plaintiffs.

Singleton J. found that the defendants were negligent, and awarded the plaintiffs 3400*l*. under Lord Campbell's Act, and 750*l*. under the Law Reform (Miscellaneous Provisions) Act, this sum being set off against the other in the usual way. In assessing damages, he had regard only to the position at the date when the cause of action arose, and ignored the subsequent death of the widow.

The defendants appealed on damages only, alleging that the award was excessive and that Singleton J. was wrong in ignoring the death of the widow. A report is only called for on the latter point. The Court held that the amount was not such as to entitle the Court to interfere on the first ground.

Odgers K.C. and *Felix Denny* for the appellants.

Samuels K.C. and *Aiken Watson* (for *A. H. Armstrong*, on war service) for the respondent were not called on.

SCOTT L.J. In my view, the judge took an erroneous view of the date at which he ought to assess the damages in this case. He looked back to the date of Lieut. Williamson's death, and gave the plaintiffs, under Lord Campbell's Act, damages representing not the actual amount which the widow lost during the fourteen months of her widowhood, but a sum based upon her whole expectation of life at the date of her husband's death. It is quite true that the measure of damages has to be assessed as at that date, but courts in assessing damages are entitled to inform their minds of circumstances which have arisen since the cause of action accrued and throw light upon the reality of the case. It seems to me wholly wrong to say that where a death which involves the liability of a third party has occurred, as in this case, some years before the assessment of damages by the court, the court ought to shut its eyes to the fact that one dependant has had only a short tenure of life before death put an end to her dependence. I think, in the circumstances of this case, only a comparatively small figure ought to have been allowed for the widow under Lord Campbell's Act.

CLAUSON L.J. I agree. I must point out that if the correct sum awarded to the widow—say 300*l.*—representing the difference between what she received in pension during her fourteen months of widowhood and what she might have expected to receive from her husband were deducted from the 750*l.*, the rest of the 750*l.* could not have been set off against the child's claim under Lord Campbell's Act. It could only be set off against the widow's claim. That might have resulted in the child receiving more than 2650*l.*, but there is no cross-appeal, and I am satisfied that no injustice was done to the child.

DU PARCQ L.J. We have not heard counsel for the respondent on the point about the date with regard to which the assessment of damages should be made. Subject to that, however, I think it is important that judges should not follow the course adopted by Singleton J. In one sense it is true to say that the moment at which damages are to be fixed in a case under Lord Campbell's Act is the moment of the death. That does not mean that one should shut one's eyes to everything which has happened subsequently. When a man is killed, and an action is brought, one has to see what the result of his death is likely to be in the way of pecuniary loss. It may be, if the matter comes to trial expeditiously, that judgment must be given when many matters are left in doubt, but the question which the Court or the jury has always to do its best to decide on the available materials is, "What "was the resulting damage when this man was killed?" One of the elements which has to be taken into account under Lord Campbell's Act is the dependants' prospect of life. In most cases which I have tried nobody has suggested that the widow was in anything but good health. Sometimes it was said that the widow was elderly, and could not be expected to live much longer. Much more rarely, I have known it proved that the widow was suffering from some illness, and therefore could not live much longer. Nobody, at any rate, has ever doubted that evidence is admissible to prove that the widow or other dependant is unlikely to live long.

In assessing damages one is in a happier position if one

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can find that certain events have happened than if one has to speculate about events which are likely to happen. In the present case, if the widow had been still living at the trial, no one could doubt that evidence could have been called to show that unhappily she was suffering from a grievous disease and that it was unlikely that she would live more than a few months. If that is so (and I conceive that there is no question about it), it seems incomprehensible that it should be suggested that the Court must say "I cannot "hear evidence to show that the woman is dead," or, rather, "Although she is dead, I must shut my eyes to that fact. I "must assume that she is alive and speculate in that region of "phantasy as to her prospects of continuing to live." With the greatest respect to the judge, I think that the observations of counsel for the appellant on that point are well founded.

It is very often difficult to assess damages. In cases under Lord Campbell's Act, in particular, many chances have to be taken into account, and it would introduce quite unnecessary difficulties if juries were to be told that they must shut their eyes to what they knew had happened. I think it important that these unnecessary difficulties should not be introduced. I have only to add that I entirely agree with what has been said by the other members of the Court.

[The Court being of opinion that the amount awarded by Singleton J. was not excessive, and that since, in the absence of a cross-appeal, the infant son of Lieut. and Mrs. Williamson received under his mother's will the same as he would have received from the defendants if her death had been taken into account when damages were assessed, the appeal was dismissed.]

Appeal dismissed.

Solicitors for the appellants: *Rashleigh, Turner, Mann & Rosher.*

Solicitors for the respondents: *Amphlett & Co., agents for R. V. Stokes and Metcalfe, Portsmouth.*

J. W. H.

1940
Aug. 19.

LYUS *v.* STEPNEY BOROUGH COUNCIL.

Emergency legislation — Street lighting — Metropolis — Obstruction — Sandbin in street under statutory authority—Prohibition of lighting — Duty of local authority to render obstruction safe — Lighting (Restrictions) Order, 1939, *para.* 1.

On September 15, 1939, while street lighting was prohibited by the Lighting (Restrictions) Order, 1939, para. 1, owing to the war, the plaintiff was injured by colliding in the dark with a sandbin placed by the defendants on the pavement under their statutory powers. The defendants had taken no steps, by whitening the sandbin or otherwise, to render it visible to persons using the highway :—

Held, that the mere fact that a local authority are absolved from their statutory duty to light the streets does not absolve them from their common law duty to exercise reasonable care to see that persons using the highway are not inconvenienced or injured by carelessness on the part of the authority, and that the defendants had been negligent in failing to whiten, or otherwise render visible, the sandbin, so that the plaintiff was entitled to recover damages in an action against them.

Morrison v. *Sheffield Corporation* [1917] 2 K. B. 866 followed.

ACTION tried by Humphreys J.

The plaintiff, Arthur George Lyus, claimed damages from the defendants, the Stepney Borough Council, for personal injuries. On September 15, 1939, when the Lighting (Restrictions) Order, 1939, was in force, the plaintiff was walking, shortly after 9 P.M., along Settles Street in the defendants' borough, when he collided with a sandbin placed there by the defendant council in pursuance of their statutory powers. The night was very dark, and Settles Street, a narrow road with high buildings on each side, was particularly so. The sandbin stood rather further back from the edge of the pavement than a lamp-post would have done, and was three feet ten inches in height. The plaintiff, who suffered injury, alleged that the defendants had been negligent in failing to take any steps, in the absence of lighting, to render the sandbin visible. The defendants denied liability.

Beyfus K.C. and *Rhymer* for the plaintiff.

Havers K.C. and *H. Samuels* for the defendants.

HUMPHREYS J. This case has given rise to a very difficult question, and I find myself confronted with authorities all of which I should like to follow and all of which are binding on me, but with regard to which I have the greatest possible difficulty in understanding how they can all be right.

[His Lordship stated the facts, and assessed damages, subject to the question of liability, at 150*l*. in addition to 40*l*. special damages, and continued :]

Is the plaintiff entitled to recover anything ? That is a question of law. It is said that the sandbin is an obstruction on the highway and that therefore it is, prima facie, unlawfully there. But the defendants have satisfied me that they put it there by statutory authority, and it is lawfully there. The statutory authority is to be found in s. 33, sub-s. 1, of the London County Council (General Powers) Act, 1928, which enacts that a borough council may, among other matters, provide and maintain in a street what are called orderly bins for sand. The section provides, by sub-s. 2, as one would expect : "Nothing in this section shall empower a borough council to "hinder the reasonable use of a street by the public." The result of that statutory power is that the sandbin was not a nuisance, but the statute does not exempt the council who put it there from the obligation to use reasonable care to see that it does not cause injury to the public in the exercise of their primary right of using the thoroughfare for the purpose of passing along it without hindrance. I cannot hope to express the point better or more clearly than it was put by Lord Parker in *Great Central Ry. Co.* v. *Hewlett* (1) : "My "Lords, it is undoubtedly a well-settled principle of law that "when statutory powers are conferred they must be exercised "with reasonable care, so that if those who exercise them "could by reasonable precaution have prevented an injury "which has been occasioned, and was likely to be occasioned, "by their exercise, damage for negligence may be recovered." I have no doubt myself that that was the state of the law on September 15, 1939.

What reasonable precautions were there which the defendants could take ? The council were in this position. When they erected the sandbin in 1936 it was unnecessary for them to take any new precaution to show where it was. They were already under a statutory obligation adequately to light the streets in their borough, and they were doing so. The sandbin, being right under a street lamp, or within a very short distance of one, was properly lighted. On September 1, 1939, two days before war was declared, but in contemplation of that unhappy event, the Lighting (Restrictions) Order, 1939, was made under the Defence Regulations. It provides : "Subject as "hereinafter provided, no person shall during the hours of "darkness . . . . permit . . . . any light . . . . to be dis-"played." It is, therefore, an offence to exhibit any light unless it is exempted by these regulations. That had the effect of abrogating, temporarily at all events, s. 130 of the Metropolis Management Act, 1855, which required the defendant council to light the streets in their area. They had, therefore, quite properly ceased to light the streets. They had already begun, as early as August 18, to take precautions to prevent persons using the streets from being endangered by obstacles which had been lighted but which were not thereafter to be lighted. They started on that date to see that the obstructions which they had put in the streets should now be dealt with in some way or another, either by such lighting as was allowed, or by white paint, so as to prevent persons being injured by them in the darkness. That means, I think, that the defendants realized that there was a duty on them in law still to take reasonable precautions so to carry out the statutory duty of providing sandbins that they did not cause unnecessary danger to people.

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(1) [1916] 2 A. C. 511, 519.

What I am told they did was to start on the more important thoroughfares and deal with the refuges. Nobody would complain of that, because a refuge in the middle of a road is something which affects the traffic in the road as well as the pedestrian. Apparently, although the defendants began this work on August 18 they had not by September 15 reached the particular street, Settles Street, in which the accident happened. Towards the end of October or the beginning of

November, the bin was quite visible on the darkest night, because it had been painted white. Unfortunately for the plaintiff, there was no indication to him on September 15 that the bin was there at all.

The first proposition put forward on behalf of the defendants is one which is said to be derived from the decision of the Court of Appeal in *Wodehouse* v. *Levy. St. Marylebone Borough Council, Third Party.* (1) In that case Cassels J. had held that the council there had been guilty of a breach of duty in not lighting a certain obstruction. I think he held that there was a statutory duty by reason of the Act of 1855. It is not contended in this case that that decision was right, but Cassels J. also held that there is still a common law duty on a local authority to do what may reasonably be done to prevent people from being injured as a result of their carrying out their duties, which include the putting of obstructions in the street. I have the most profound respect for the decision of the Court of Appeal in *Wodehouse* v. *Levy* (1), and in particular, perhaps, the judgment of Goddard L.J., who said (2): "Parliament having authorized the local authority to put a "refuge in the street and not having imposed upon the authority "the duty of putting a light on the obstruction itself, it "follows that the local authority are committing no breach "of statutory duty if they put a refuge in the street and do "not put a light on that refuge." Everybody agrees with that, so long as the street itself is lighted. He went on: "But that in no way lessens the obligation of the borough "council or other local authority to provide an adequate "system of street lighting, and the system would not be "adequate if it did not cause a reflection or light to show "the position of obstructions in the streets. Thus, in peace-"time when these refuges are in the streets, while there is "no obligation on the council to put a beacon or lamp actually "on the refuge, they must arrange their street lighting so "that there will be enough light for passengers in the road "to see and thus avoid the obstructions which the council "have put there. . . . . Their obligation is only to provide an

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(1) Ante, p. 561. (2) Ante, p. 568.

"adequate system of street lighting, and when the [Lighting "(Restrictions)] Order came into force, which prevented their "lighting the streets at all, it followed that their obligation "to provide street lighting was not only gone, but actually "prohibited." I respectfully agree with that. "I can find "no duty," he continued, "on the council after that regulation "came into force, under which they were bound to light the "obstruction"—I respectfully agree—" because, as my Lords "have pointed out, the provision in para. 4 of the order that "the order shall not apply to a certain class of lights is only "permissive."

With that judgment, so far as it goes, I entirely agree. It does not seem to have been suggested in that case that there was another way in which the local authority might have prevented the obstruction from being a danger to traffic, and that was by whitening it. I do not know whether that is a thing which can be done or cannot. I do not know much about the streets at night in these days, but I do not find any sort of argument in that case to the following effect: "It is quite true we cannot blame you for not lighting it, "but why should not you whiten it?" The whole question turned, I think, on whether, as Cassels J. seems to have held, it was right to say that, although the council were prohibited from showing lights in the streets, nevertheless their statutory duty to light the streets in some way remained. With respect to that learned judge, that was rather a difficult proposition to maintain.

I now turn to another case decided by the Court of Appeal: *Morrison* v. *Sheffield Corporation*. (1) That was a case where a corporation had planted trees in a street and round those trees had placed guards consisting of steel railings which were dangerous to any pedestrian at night unless the place was lighted, as ordinarily it was. In 1917, during the last war, a restriction was also placed on lighting, and the question arose whether that extinguished the duty which up to then had certainly been upon the Sheffield local authority to see that persons were not endangered by those guards when lawfully

(1) [1917] 2 K. B. 866.

using the highway. Two questions were left to the jury. The first was: "Was the guard dangerous in the circumstances of "the darkness that existed?" and the jury said that it obviously was. I should say the same in regard to the sand-bin in the present case. Secondly: "Ought the defendants, "if they exercised reasonable foresight and took reasonable "measures, to have neutralized the danger before the date of "the accident?" The jury answered: "Yes." The contention for the defendants was that, having erected the guard round the tree at a time and in circumstances when it could not be contended that it was not reasonably safe, since the place was then adequately lit, no further duty was imposed on them by the Order which plunged the city into darkness. Lord Reading said that he found it impossible to accept that view of the law, and Pickford and Scrutton L.JJ. agreed.

In my view those judgments represent the law, and the mere fact that a corporation are absolved from the duty of lighting the streets does not absolve them from the duty, which the common law imposes on them, to see that persons using the highway are not unduly inconvenienced or injured by any carelessness on the part of the authority. No doubt, there is no absolute undertaking by them, nor are they absolutely required to see that persons do not have accidents. All that they are required to do is to exercise reasonable care.

That brings me to the difficult question here, the second question put to the jury in *Morrison* v. *Sheffield Corporation* (1) "Ought the defendants, if they exercised reasonable foresight "and took reasonable measures, to have neutralized the "danger before the date of the accident?" That seems to me to put the question very well, and I rather regret that in this particular case there is not a jury to answer it. I may say that I have not the least doubt about how a jury would answer it. The view which I take of the matter in the present case is that, if there were a duty—if I am wrong about that then my judgment is clearly wrong—cast on the defendants to take reasonable steps to prevent danger to persons passing along the highway in question, then, between August 18

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(1) [1917] 2 K. B. 866.

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and September 15 they had ample time to do something. I do not care what that something should be. If they had only put a great splash of paint or whitewash on the edge of the sandbin, which was a large obstruction taking up very nearly half the width of the pavement—and the splash of paint or whitewash would have taken no time and could have been done by a man covering miles every day—they would have prevented this accident. I cannot say in the circumstances of this case that they have taken reasonable care. I think that they were paying, not unnaturally, so much attention to the main roads that they took the chance of somebody running into an obstruction in one of these minor roads. For those reasons, I find that there was negligence on their part, and I think that the plaintiff is entitled to the damages which I have awarded.

Judgment for plaintiff.

Solicitors for plaintiff: *J. Tickle & Co.*
Solicitor for defendants: *J. E. Arnold James.*

J. W. H.

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July 31.

Factory Acts—Basement bakehouse—Ventilation inadequate—Certificate of suitability—Notice of withdrawal—Appeal against withdrawal—Defect remedied between notice and final hearing of appeal—Powers of Court—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 54.

By the Factories Act, 1937, s. 54, the use of a basement bakehouse is prohibited, unless (sub-s. 1) it was so used at the passing of the Act, and a certificate of suitability has been issued by the district council.

By sub-s. 2, an examination of every basement bakehouse is directed to be made by the council in 1938 and in every fifth succeeding year, and if it is not found to be suitable for use as such in certain respects, including "ventilation," the council are to give notice in writing to the occupier that the certificate shall cease to operate after a specified period (being not less than one month). But if the council are satisfied that the bakehouse is suitable, then they are to give notice in writing that the certificate is to continue to operate. By sub-s. 3, the occupier may within twenty-one days "appeal by way of complaint to "a court of summary jurisdiction, and the court may, if it is "satisfied that the bakehouse is suitable as regards the matters "aforesaid, by order direct that the certificate shall continue to "operate."

The Fulham Borough Council served notice upon the occupiers of a basement bakehouse in their area under s. 54, sub-s. 2, on the ground of inadequate ventilation, and the occupiers appealed under sub-s. 3.

The hearing of the appeal was adjourned for a month and the occupiers meanwhile improved the ventilation by the installation of new apparatus. When the hearing was resumed and completed, the magistrate expressed himself as satisfied that the ventilation was now satisfactory, and directed that the certificate should continue to operate:—

Held, that upon the plain meaning and construction of s. 54, sub-s. 3 (supra), the magistrate was justified in paying attention to the alterations effected by the occupiers between the date of service of the notice and the conclusion of the hearing.

CASE stated by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the West London police court two appeals were lodged by A. B. Hemmings, Ld. (hereinafter called "the respondents") under the Factories Act, 1937, s. 54, sub-s. 3, by way of complaint

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against the determination by the Fulham Borough Council (hereinafter called "the appellants") under the Factories Act, 1937, s. 54, sub-s. 2, by notice to the respondents dated May 12, 1939, within six months from the said date to withdraw two certificates of suitability for use as basement bakehouses previously issued by the appellants in respect of premises at 393, North End Road, and 63, Walham Grove, respectively in the borough of Fulham.

According to the case stated, the following facts were proved or admitted at the hearing: Certificates of suitability for use as underground bakehouses had been duly issued to the respondents in respect of each of the two premises under the Factory and Workshop Act, 1901. Notices of the intention of the appellants to withdraw such certificates within six months of service thereof were duly given by the appellants to the respondents on May 12, 1939, pursuant to the Factories Act, 1937, s. 54. Prior to the service of the said notices the appellants did not give any notice to the respondents that the appellants were not satisfied that the said bakehouses were suitable for use as such as regards construction, height, light, ventilation, and any hygienic respect. At all material times the respondents occupied the premises and used them as basement bakehouses and continued so to do up to the hearing of the appeal. Prior to the service of the notices the premises were examined by an inspector of the Medical Officer of Health's department, but were not inspected by the medical officer personally until after the service of the notices. As a result of such examination the appellants were not satisfied that the premises were suitable for use as basement bakehouses. The matters in respect of which the appellants upon examination made complaint in relation to the premises were (*a*) ventilation, (*b*) lighting, (*c*) facilities for cleaning. Up to a date between June 23, 1939, when the appeal first came on for hearing and July 20, 1939, when the hearing was resumed after adjournment, the ventilation of the premises was inadequate and unsuitable, according to the standard set by the appellants which was accepted as being reasonable.

The method of ventilation of the two bakehouses at the time of the service of the notices was a method which was in existence at the time of the grant of the certificates, and such method was that usually employed in small underground bakehouses; but the method of ventilation did not comply with the higher standard of ventilation which was now being required by the appellants. Between June 23, 1939, and July 20, 1939, during an adjournment of the hearing of the appeal, the respondents by an expenditure of 600*l.* improved the ventilation of the said premises by the installation therein of electrical air-conditioning apparatus. After the installation of the said apparatus the ventilation of the said premises was in all respects satisfactory.

On the part of the appellants it was contended: that the proven unsuitability and insufficiency of the ventilation of the premises on May 12, 1939, justified the appellants in giving notice of withdrawal of the certificates of suitability of the premises for use as a bakehouse; and that upon a true construction of the Factories Act, 1937, s. 54, the respondents were not entitled after the date of service of the notices of withdrawal of certificates of suitability to rely upon alterations effected after such date, there being no provisions in the Act enabling them to affect the position by such alterations.

On the part of the respondents it was contended: that each of the two bakehouses were suitable for use as such as regards construction, height, light, ventilation, and any hygienic respect. That the appellants were not entitled to use the provisions of the Factories Act, 1937, s. 54, for the purpose of closing underground bakehouses in existence at the date of the passing of the said Act unless such bakehouses failed to satisfy the provisions of s. 54, sub-s. 2 (*a*): that the bakehouses were suitable for use as such as regards ventilation having regard to all the circumstances, including the fact that the method in existence on May 12, 1939, was a method which had been in use for a long period of time; that it had not deteriorated in any way, and that the health of the men employed therein was good, and that no complaints had been made by the employees in respect of the method of ventilation; that the standard of suitability set by the appellants was a standard of perfection and had no regard to the standard generally prevailing in underground bakehouses in London or elsewhere: that upon the true construction of the Factories Act, 1937, s. 54, sub-s. 3, a court of summary jurisdiction is entitled to direct that the certificates provided by the section shall continue to operate, if it is satisfied that at the time of the hearing of the appeal the bakehouse satisfies the provisions of s. 54, sub-s. 2 (*a*), of the Act: that the word "is" in s. 54, sub-s. 3, means "is" and not "was." That if the appellants desired to raise the standard of suitability of underground bakehouses it was their duty to give to the respondents notice of the fact that they were requiring underground bakehouses to satisfy a higher standard than that which had hitherto prevailed.

The learned magistrate held upon the specific words of s. 54, sub-s. 2, and upon the authority of *Marriott* v. *Minister of Health* (1) that he was entitled to pay attention to the present state of the premises, i.e., the condition when the appeal came before the court, and he found upon this that the premises were suitable to be used as bakehouses as regards ventilation and directed that the certificates of suitability should continue to operate as if a notice had been given under s. 54, sub-s. 2 (*b*).

Granville Sharp (*John Morris K.C.* with him) for the borough council (appellants). The council have done what the Act of 1937, s. 54, required and their action was justified. Since 1901, when the Factory and Workshop Act, 1901, was passed, the policy of the Legislature has been to abolish basement bakehouses. The Factories Act, 1937, s. 54, is a peremptory section, and the only question for the learned magistrate was whether the notice served on the occupiers was properly served at the time of service. There is no locus pœnitentiæ for the occupiers after service of the notice. In s. 53 of the Act, which deals with underground rooms, there is a provision enabling the occupier to make the rooms suitable for occupation although previously regarded by the inspector as unsuitable: there is no such provision in s. 54. In the Housing Act, 1936,

(1) [1937] 1 K. B. 128.

s. 11, there is also a provision such as the occupiers seek to extract in the present case from the Factories Act, 1937, s. 54.

Marriott v. *Minister of Health* (1) was cited by the respondents, but there, as Swift J. points out in his judgment, the order needed confirmation by the Minister. No such confirmation is here needed, and the two cases are not parallel. The notice served by the council was in order at the time of service and should have been affirmed by the court.

Laski K.C. and *Astell Burt* for the respondents. Proceedings before a court of summary jurisdiction under s. 54, sub-s. 3, of the Factories Act, 1937, are not by way of appeal against the notice given by the council. They are a determination by the court on a state of facts as it exists when the determination is arrived at. [He referred to *Reg.* v. *Montagu.* (2)] The words of s. 54, sub-s. 3, are clear: the court of summary jurisdiction upon an appeal by the occupiers has to decide whether the bakehouse is suitable when the hearing takes place, and not whether it was suitable at some earlier date. The magistrate was right in his interpretation of the section.

HUMPHREYS J. The Factories Act, 1937, s. 54, commences by providing that a basement bakehouse shall not be used as a bakehouse unless it was so used at the date of the passing of this Act. That is a mere re-statement of the law as it had been since the year 1901, for by the Factory and Workshop Act, 1901, s. 101, it is provided that an underground bakehouse shall not be used as a bakehouse unless it was so used "at the "passing of this Act." The Act of 1937, s. 54, adds (sub-s. 1) that not only must the bakehouse have been used at the date of the passing of this Act, but also a certificate of suitability must have been issued by the district council under the Factory and Workshop Act, 1901. By sub-s. 2: "It shall be "the duty of every district council to carry out, in the year "beginning at the date of the commencement of this Act and "in every fifth succeeding year after that year, an examination "of every basement bakehouse in respect of which a certificate

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(2) (1884) 49 J. P. 55.

"of suitability has been issued and—(*a*) if as the result of the "examination the council are not satisfied that the bakehouse "is suitable for use as such as regards construction, "height, light, ventilation, and any hygienic respect, "they shall give notice in writing that the certificate "shall cease to have effect after the expiration of such "period, being not less than one month, as may be "specified in the notice, and the basement bakehouse shall "not be used as a bakehouse after the expiration of that "period." On the other hand, (*b*) " if the council are satisfied "that the bakehouse is suitable . . . . they shall give notice "in writing that the certificate shall continue to operate."

[His Lordship referred to the facts in the case stated and continued:] It is further provided in s. 54, sub-s. 3, as follows: " Where the district council give notice that a "certificate of a basement bakehouse is to cease to have effect " —that is this case—" the occupier may, within twenty-one "days of the notice, appeal by way of complaint to a court "of summary jurisdiction, and the court may, if it is satisfied "that the bakehouse is suitable as regards the matters aforesaid, "by order direct that the certificate shall continue to operate "as if a notice had been given under para. (*b*) of the last "foregoing subsection "—that is to say, as if the council had been satisfied that the bakehouse was suitable. In this case the occupiers of the bakehouse gave such a notice of appeal, and came before the learned magistrate who has stated this case.

The contention of the appellants was that the magistrate ought to pay no attention to the alterations which had been made during the adjournment of the hearing. Whether that contention is correct or not is the only question which is raised in this case; and it is necessary to examine it.

The learned magistrate said that from a consideration of the express words of the section and a decision of the Court of Appeal in *Marriott* v. *Minister of Health* (1) he was justified in regarding the state of the premises at the time when he had to declare whether they were suitable or not; in particular he relied upon these words in sub-s. 3: " the court may, if it

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"is satisfied that the bakehouse is suitable as regards the "matters aforesaid, by order direct that the certificate shall "continue."

In my view the learned magistrate was correct in this opinion. The appeal which is referred to in sub-s. 3 is not an appeal merely brought in order to decide the question whether some act done in the past was correctly done. It is true that it is open to the appellant before the learned magistrate to say that the notices were bad, and that, therefore, he is entitled to succeed. It is relevant to consider what was the state of the premises at the time when the notices were given, and in my opinion the findings of the magistrate show that the notices were properly given and were justified by the state of the premises at that time; but that is not the whole duty of the magistrate under this section. As Mr. Laski correctly argued, it is not like an appeal against a conviction in which the only question before the court is whether the person did commit an offence in the past at the time and place which are alleged against him. It is more analogous to the case in an appeal court which has to decide whether an order to abate a nuisance by some public authority is one which it must uphold or which it ought to alter—and in such a case a court is not confined to the consideration of the question whether, at the time that the notice to abate the nuisance was served, there was or was not a nuisance, if there is evidence before the court, in spite of that fact, that there is at the moment no nuisance existing. It would certainly surprise me to be told that the law of this country requires, in such a case, that the court should declare that there is a nuisance existing and order the abatement of that nuisance when the court is of opinion that there is no nuisance existing at all.

I think the duty of the magistrate under this section is very much the same, because the word is " is ", as has been pointed out so often. The magistrate is to be satisfied that the bakehouse "is " (not " was " at the time when the notice was given) suitable as regards the matters aforesaid, and for that reason I think the magistrate was justified in taking the view which he did; indeed, I think that the correctness of that view appears from the reading of that section, without reference to any other matter at all.

Our attention has been called to s. 53 of the Act which, in dealing with underground rooms, provides in terms for enabling an occupier who is using an underground room which, for some reason or other, is unsuitable, to make alterations and make it suitable for occupation although it is an underground room. But in that case there is a right of appeal in very different terms from those employed in s. 54. The appeal is given in these terms: "If the occupier is aggrieved by any "decision of an inspector"—not of a court, but of an inspector who has examined the room regarded as unsuitable—"he may, "within twenty-one days of the date of issue of the certificate ". . . . appeal . . . . to a court of summary jurisdiction." In that case it may well be that the only question which the court has to consider is whether it is right to say that the underground room is or was suitable for occupation as an underground room having regard to the fact that the inspector is bound to suspend the operation for such period as he considers necessary to enable the occupier to render the room suitable. That seems to me a very different matter from the appeal which is provided for in s. 54, sub-s. 3.

We have also been referred to the Housing Act, 1936, in which there is a more or less similar provision dealing with totally different matters; and for my own part I do not derive any assistance from a consideration of that, nor does *Marriott* v. *Minister of Health* (1) referred to in the case stated, assist the court to arrive at a decision here. That, again, was a different class of matter arising under a different statute.

Reg. v. *Montagu* (2) is a little nearer to this case. In that case the court had to consider the position of a licensed house which had certain privileges attaching to it, one of the privileges being that the renewal of the annual licence could not be refused except upon certain grounds, one of which was that the premises were not qualified by law. That meant in those days, that the premises were not of a sufficient rateable value, in regard to most licensed houses, and there were other qualifications required. The question arose there as to what the position was in a case where, at the date when the matter originally arose and opposition was made to the renewal of the certificate, the premises were not qualified by law, but where, between that date and the date when the matter became ripe for the decision of the local justices, the premises had been made suitable. The decision of the court was that the justices were bound to pay attention to the question as it arose, and that a decision that the licence was properly annulled because the premises were unsuitable some little time back, was wrong. That may be of some little assistance, but in my opinion the matter really falls to be decided upon the plain language of the section itself. On that language the magistrate was right in the conclusion at which he arrived. I think that he properly applied his mind to the law, and that, therefore, this appeal should be dismissed.

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(1) [1937] 1 K. B. 128.

(2) (1884) 49 J. P. 55.

ATKINSON J. I agree. It seems to me that, primâ facie, one has to construe the language in its plain, grammatical meaning unless there is some good reason to the contrary; and if one departs from the grammatical meaning in this case one finds oneself in a world of inconsistencies and injustices. There are three earlier dates indicated. First there is the date when a medical officer of health or an inspector makes his examination and report. I have no doubt that the council comes to its determination upon such a report. Then there is the date upon which the council determines that it is not satisfied that the bakehouse is suitable for use; and thirdly, there is the date of the serving of the notice. Is the court to consider whether the report was well founded, or is it to go to the date when the council came to its determination, or to the date of the notice? The respondents say the date of the notice, but to what does that lead? If the inspector says to the owner, " I do not like this ventilation; "I am afraid I shall have to report adversely about that," and promptly the owner gets the matter dealt with and has the ventilation put right, and the council, not knowing that anything has been done, comes to its determination that the premises are unsuitable and serves a notice, on the contention of the respondents here the appeal should succeed, because at the date of the notice the premises were suitable. If, however, the inspector does not indicate what he thinks is wrong, or, indeed, being anxious to see these basement bakeries closed, indicates that he has nothing to complain of, there the owner, believing that things are all right, does nothing, and is served with a notice, it seems to me that a gross injustice would result. The owner is to be closed down although he has had no notice and no opportunity at all of meeting the deficiency. There is no suggestion in this case that the man was in any way at fault. The insufficiency was not due to any neglect on the owner's part, but to the raising of the standard required by the council. It would seem a hard, and a strange result, if a council can raise its standard with regard to some requirement and then serve a notice upon an owner, if from that moment he is to have no opportunity of altering his premises in accordance with the requirement. These are relevant considerations because it may be that a court can be asked to construe words in other than their grammatical meaning if some other reading of the words would lead to a more reasonable construction; but once we depart from the grammatical meaning here we get most unreasonable results. It must be remembered that every bakehouse to which this section can apply must have been in existence before 1901 and must have been certified as suitable by the council. That is under s. 101, sub-s. 4, of the Factory and Workshop Act, 1901: "An underground bakehouse "shall not be certified as suitable unless the district council "is satisfied that it is suitable as regards construction, "light, ventilation and in all other respects." The section we have to construe is, therefore, dealing with bakehouses which have in fact been certified by the council as suitable, and it would seem to me a most unreasonable construction to say "The Legislature really meant that an owner "of premises which have been certified as suitable, and "which have only become unsuitable because the council, "without any publication of its change of view, has raised "its standard, should be debarred by the service of a notice "from any opportunity of bringing his premises up-to-date." "I cannot think that we should attribute to Parliament the desire to close down enterprises of long standing. The intention we ought to attribute to Parliament is rather that they wish enterprises to be continued so long as they are continued under hygienic conditions; and therefore, in my opinion, the only way in which these words can be properly construed is in accordance with their plain grammatical meaning. Any other construction would lead to results which cannot have been intended by Parliament, and which could work considerable injustice. I agree that the appeal should be dismissed.

CROOM-JOHNSON J. We are dealing here with bakehouses described as underground, which must have been in existence before the passing of the Factory and Workshop Act, 1901, on August 17, 1901, and under s. 101 of that Act an underground bakehouse is not to be used as a bakehouse unless it was so used at the passing of that Act, and subject to that provision there is an arrangement laid down in that section under which certificates may be granted by the district council that the underground bakehouse is suitable for the purposes of being used as such. In that Act, s. 101, sub-s. 7, there appeared a right, in a case of refusal of a certificate by the district council, for the occupier of the bakehouse to apply to a court of summary jurisdiction by way of complaint; and if it appeared to the satisfaction of the court that the bakehouse *is* suitable for use as regards construction and certain other matters, the court would thereupon grant a certificate of suitability of the bakehouse which should have effect as if granted by the district council.

It is interesting to observe that that is very nearly forty years ago, and we have not been referred to any case in which it was suggested that the words " is suitable " in that section had any other meaning than the plain meaning which is to be attributed to tolerably plain language.

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In 1937 the section, so far as the Act of 1901 was concerned, was repealed, and the legislation is now to be found in the Factories Act, 1937, s. 54: "Without prejudice to the provisions of the last foregoing section, a basement bakehouse "shall not be used as a bakehouse unless it was so used at "the date of the passing of this Act and a certificate of "suitability had been issued by the district council under an "enactment repealed by this Act"—obviously referring to the Act of 1901. Sect. 54 then goes on to make it the duty of every district council to carry out in the year beginning July, 1938, and in every fifth succeeding year an examination of every basement bakehouse in respect of which a certificate of suitability has been issued; therefore it is a re-examination of places which have been up to that time lawfully used, in which a lawful enterprise has been carried on, because, notwithstanding the prohibition in the Act of 1901, it had received a certificate of suitability.

The Act then provides that if, as a result of the examination, the council are not satisfied that the bakehouse is suitable, they may serve a notice (which was served in this case) on the occupier of the bakehouse that after the expiration of not less than one month the certificate will cease to have effect.

If the council are satisfied that the bakehouse is suitable they are then (sub-s. 2 (*b*)) under an obligation to give notice in writing that the certificate shall continue to operate so long as the bakehouse may otherwise lawfully be used, but without prejudice to the power of the council to revoke the certificate as the result of a subsequent examination under the sub-section. I presume, without deciding it, that that is a reference to the quinquennial period under which they are empowered, and indeed directed, to make their subsequent examinations.

Thereupon follows the sub-section which has to be construed in this case, and that applies in cases where the district council have given the notice under sub-s. 2 (*a*) of their intention to cease to grant the certificate of suitability on some future date. It empowers the occupier within 21 days of the notice to appeal by way of complaint to a court of summary jurisdiction.

The question which arises is from these words in s. 54, sub-s. 3: "and the court may, if it is satisfied that the "bakehouse is suitable," then do certain things, one of which is, the court may " by order direct that the certificate shall "continue to operate as if a notice had been given under "paragraph (*b*)."

Paragraph (*b*) is the notice which is to be given by the district council in a case where it is satisfied. Ex hypothesi this district council never has been satisfied, and therefore it is obvious to my mind that when the court, under sub-s. 3, is examining whether it can direct an order on the basis of sub-s. 2 (*b*), it is for the court to determine then and there whether it is satisfied. I add that, because it seems to me that it strengthens the plain meaning of the words "is satisfied" which are used in the sub-section; and it seems to me, as Atkinson J. has pointed out, that any other view of this case would involve both the court and the parties in all sorts of difficulties. It is true (and I mention it merely to show that I have not overlooked it) that sub-s. 3 goes on to say that the court may, as an alternative, by order extend the period at the expiration of which the certificate is to cease to have effect; but that does not detract from the force of the point which I have indicated, which is a plain indication of the intention of the Legislature to substitute a determination, or "satisfaction" (if that be the right word), by the court of summary jurisdiction before whom the matter comes for the want of satisfaction by the district council against which the complaint by way of appeal has been launched by the aggrieved occupier. One must bear in mind, in construing language of this sort, that this is a case in which people are carrying on a reputable business permitted under a certificate which must have been in existence ever since the year 1901, and in those circumstances, as what is sought to be done is to deprive the occupier of his right so to carry on his business, we ought to construe this language strictly. As I see the case, the language is so plain that it is not really susceptible of very much doubt.

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I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *W. Townend, the Town Clerk, Fulham.*

Solicitors for respondents: *Sturton & Sturton.*

F. P. F.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1940.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1940, will be as follows :—

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